SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 477

THE LIQUID CARBONIC CORPORATION,
APPELLANT,

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civ. #9179.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE LIQUID CARBONIC CORP., et al., Defendants

TRANSCRIPT OF HEARING—January 18, 1954.

Brooklyn, New York.

Before Honorable Leo F. Rayfiel, U.S.D.J.

APPEARANCES:

Herbert Brownell, Jr., Esq., Attorney General of the United States, By Alfred Karsted, Esq., Special Assistant to the Attorney General.

Messrs. Satterlee, Warfield & Stephens, Attorneys for Defendant, By James F. Dwyer, Esq., and Francis D. Kalosky, Esq., of Counsel.

[fol. 2] The Court: Will you begin, Mr. Karsted.

Mr. Karsted: If your Honor pleases, this matter arises under a motion by the Government requesting an order from your Honor to carry out the judgment that was entered in this case against the Liquid Carbonic Corporation.

I will recite, very briefly, what our motion contains. In our motion we recite that judgment was entered on March 7, 1942——

The Court: 1952.

Mr. Karsted: 1952, excuse me.

Your Honor, in Section 9(e) of the judgment, Liquid Carbonic was ordered to divest itself of two plants pursuant to provision of Section (e).

The remainder of the provisions of Section (e) in effect provided that a trustee should be appointed by the Court to handle the disposal, that he should be appointed for the term of one year, and he was restricted in the class of cus-

tomer to whom he could dispose of the plants. He could only dispose of them to persons who would agree that they would use the plants for the manufacture of CO_2 or dry ice. A trustee was duly appointed. His term was extended in March, 1953, until May; and then in April, the term was [fol. 3] again extended until June 1st in regard to one plant, and until November 2nd in regard to the other plant.

Your Honor, by November 2nd, the trustee had been unable to dispose of either of the plants in accordance with the terms of the judgment, and accordingly his appointment terminated.

Your Honor, the Government takes the position that Section 9(e) requires Liquid Carbonic to dispose of the two plants.

The Court: Is that what your proposed order would seek to accomplish?

Mr. Karsted: Yes, your Honor, that is its purpose.

The Court: In other words, to direct Liquid Carbonic that it sell and dispose of its Long Island City and Indianapolis plants?

Mr. Karsted: That is right, your Honor.

Now, Liquid Carbonic has appeared, and they have filed and served us with a memorandum in opposition to our motion.

In their memorandum, as I understand it, they take the position, first, that Section 9(e) does not require them to dispose of the plants if the trustee was unable to dispose of the plants as directed by Section 9(e). Further, in [fol. 4] connection with their motion, they raise several problems or points that would be raised under the judgment if the Court were to order Liquid Carbonic to dispose of the plants, and they rely primarily on the Hughes case.

Your Honor, the position of the Government may be stated quite briefly: We take the position that Section 9(e) requires Liquid Carbonic to dispose of the plants. That section, Section 9(e) in reality has two purposes, your Honor:

First, that Liquid Carbonic dispose of the plants, which would be divesture, and the second purpose is that those plants, when disposed of, should be used for the production of CO_2 or dry ice in order that the supply thereof should

not be limited. We take the position that those two purposes are severable, and that the impossibility of accomplishing the second in no way relieves Liquid Carbonic of the obligation of the first part.

The Court: How would the compulsory sale of the plants and the absence of a customer who would operate them for the purposes of the production of CO_2, how would that compulsory sale of those plants provide the competition which the action was commenced to attempt to provide?

[fol. 5] Mr. Karsted: Well, your Honor, the action which was brought by the Government, and also the relief that was sought by the decree, was partially to provide for new competition, but primarily it was to divest Liquid Carbonic of the plant that it had acquired, in our view, illegally.

Now, the same thing was true in the Paramount case as here. There, in the Paramount case, the movie theatres were ordered disposed of, they were to dispose of the theatres, and they weren't ordered to dispose of those theatres to parties who would use those theatres for movie purposes. In some cases they were used for that purpose, but in a lot of cases where they were unable to find anybody who would operate the theatres as theatres, they were still ordered to dispose of them.

The Court: Wasn't the action in that case intended to prevent control by one group of all phases of a particular industry, such as the production and distribution and the exhibiting phases?

Mr. Karsted: Well, that is true, your Honor. However, your Honor, in essence, in a monopoly case the fact is that the one who is charged with acquiring the monopoly has done so illegally, by illegal acquisition, and at least that [fol. 6] was charged in this case.

Now, we don't want Liquid Carbonic to have the benefit of those illegal acquisitions. We don't think that Liquid Carbonic should dominate the industry that way.

Divested plants are best used in the same industry, but in many, many cases divesture is ordered regardless of what use the divested plant is put to.

The Court: Well, if you cannot find someone to operate both those plants in competition with Liquid, and you compel them to sell those two plants, aren't you reducing

the supply which will be available to the respective users of the product?

Mr. Karsted: You are, your Honor, that is correct, but since there is a reduction in supply, it is assumed that Liquid's competitors will have a better chance to help to fill those orders.

The Court: But there aren't any competitors, we don't have any here in competition with the Long Island City plant, except for a plant in Belleville, I think it is, operated by Liquid now.

Mr. Karsted: Yes, your Honor, but Liquid isn't operating the plant now, and in this affidavit which was filed with [fol. 7] their motion, they say the plant is abandoned, and they have no present intention of using it.

The Court: Yes, and that is because that is what the decree was intended to accomplish, to stop them from continuing to operate those two plants. Yes, that is according to the decree, and I might add that that decree was by consent, without any findings with respect to the issues of law and fact. Now, it was agreed that they had to some extent monopolized the manufacture and sale and distribution in this area——

Mr. Karsted: That is right, your Honor.

Let me say, your Honor, that in this Long Island plant here, and they are not using the plant, they were ordered by the decree to divest themselves of it. Now, one might say why does the Government insist upon the divesture since they are not using the plant for the production of CO_2. The point is, your Honor, that we are not sure they will continue not to use that plant. The fact that they are not producing in that Long Island plant, does give competitors an opportunity to come into this area and supply the market, but the danger is that if those competitors get too strong, Liquid Carbonic has always that Long Island plant in reserve.

[fol. 8] The Court: How can they use it in the face of the decree which restrains them from using it in production?

Mr. Karsted: No, your Honor, I don't think it does.

The Court: That is my recollection.

Does it, Mr. Dwyer?

Mr. Dwyer: No, it does not, your Honor.

Mr. Karsted: I don't believe it does.

The Court: There are no restraints against the manufacture of dry ice in that plant?

Mr. Dwyer: No, your Honor, there are none.

The Court: Well, that was my recollection.

You may proceed.

Mr. Karsted: Well, in any event, your Honor, if I were a small manufacturer, there would be the ever present danger, if I were a small competitor, that is coming in here to this area, the danger would always be present that the minute I got too strong, Liquid could always put that Long Island plant into operation.

Now, your Honor, Liquid will claim that the judgment is ambiguous—well, perhaps I should not say ambiguous, but Liquid may claim that because the direction to dispose of the plant has attached to it the words, "That such disposal shall be pursuant to the terms and conditions of sub-
[fol. 9] section (e)," that means that if the plants cannot be disposed of in accordance with those terms, then Liquid is relieved of its obligations. That is the position that Liquid has taken in their memorandum. Your Honor, we take an opposite viewpoint of that. We say it is just like any judgment that the Court hands down. If the Court orders something to be done and specifies the way in which it is to be done, if something occurs that makes it impossible to do it in that way, then I don't believe that the judgment then becomes of no force and effect.

I don't think it is saying too little to say that that is urging an irrational construction.

The Court: Would you take that position if the decree prohibited the production of those products in these plants by Liquid? That may not be a hypothetical question. I am just asking that question——

Mr. Karsted: I don't know whether we would or not, your Honor.

You see, your Honor, the theory of the complaint is that Liquid Carbonic by a series of acquisitions achieved a monopoly position. Now, of cou.se, if they have to dispose of those two plants, if they are able to sell them, then they will have the money. In effect, they will still retain the
[fol. 10] fruits of those acquisitions. The decree doesn't indicate those plants in any way, and therefore if Liquid

were simply enjoined from using those plants, I don't know whether or not we would have any real objection or not. Your Honor, I don't know whether your Honor, frankly, whether the Court could do that because I think that would actually be a modification, I am afraid it would be.

The Court: Isn't that what they contend you are seeking to accomplish by this motion, that is modifying the decree?

Mr. Karsted: That is what they complain of, but we don't think we are.

I would like to cite a case to your Honor that was decided in the Court of Appeals for the Second Circuit just as recently as 1947, and that was the case which the Court might be familiar with, the case of Standard Oil Company v. Clark.

Now, in that case Standard Oil brought an action under the Trading With the Enemy Act for the return of property that had been vested with the Alien Property Custodian. On the same day that the property was vested, Standard Oil entered into a consent decree in a Sherman Act case, and the question before the Court was this: To what extent, [fol. 11] if any, did that consent decree decrease Standard Oil's interest in the patents that were there involved?

Now, the case was first tried in the lower court and Judge Wizanski presided. Well, Judge Wizanski read that decree very, very narrowly, and came to the conclusion that the consent decree did decrease Standard Oil's property rights in those patents.

When the case was appealed to the Second Circuit, the Second Circuit took an opposite view. The Second Circuit said that when you viewed the provisions of the consent decree in the light of the whole decree and what it was meant to accomplish, and so forth, they said it would be irrational to draw the conclusion that Judge Wizanski drew.

Now, certainly the Circuit Court of Appeals did not modify the judgment; all they did was to construe it. They construed it in a broad way, and Judge Wizanski made a narrow construction, but it was not a modification of the decree but simply looking at the whole situation in the light of what was meant to be accomplished by that decree. As a result they held that Standard Oil's interest—I mean the Custodian's interest in those patents, was not decreased.

[fol. 12] Likewise we would say in this case that to construe this section as requiring Liquid Carbonic to divest itself of those properties won't be a modification of the decree.

The Court: As I remember it now, the decree provides for the appointment of a trustee under whose supervision and efforts an attempt would be made to sell the plants to someone who could use those plants and equipment for the manufacture of CO_2 and dry ice, and that anyone purchasing these plants from the trustee would be required to give assurance that the purchasers would use the plants for the purpose of manufacture of those products in competition with Liquid Carbonic, free from any control of any kind by Liquid Carbonic.

Now, is it your understanding that if the trustee could find no such purchasers, it was implicit in the decree that he be compelled to sell in any event?

Mr. Karsted: Exactly, exactly, your Honor, otherwise by the mere fortuity that the trustee was unable to find a purchaser, and we don't know for what reason no one was interested in buying for that purpose, by that mere fortuity, by that mere fortuitous circumstance, Liquid Carbonic is there with the two plants, and with all of the fruits [fol. 13] of its illegal conspiracy, and is still utterly untouched by the decree. To construe the decree in that manner is to construe the decree as accomplishing nothing.

The Court: So far as the Long Island City plant is concerned, it is my understanding that for the past two years or so, and possibly even more, only a small part of the plant has been used, and none of it has been used for production purposes. As I understand it, a small part was used for storage for, I think, the summer months, but in any event I understand it has been abandoned entirely and is not now being used at all.

Mr. Karsted: That is what we understand, your Honor.

The Court: Now, is the Indianapolis plant used in conjunction with a plant owned by others for the manufacture of some product and of which dry ice is a by-product? Is that what occurred out there?

Mr. Dwyer: Are you addressing me, your Honor?

The Court: Yes, I am addressing you.

Mr. Dwyer: My best recollection is that that is a plant

which was designed and built and used exclusively by the defendant, Liquid Carbonic. There have been plants which were discussed when we were negotiating the decree where [fol. 14] the CO_2 was a by-product of the principal manufacture of the plant, but this is not one of those.

The Court: That was true of Wyandotte and Philadelphia. I thought there was another one of those plants, but I don't remember where it was located. As I recall it, there were other processes attached to the plant, part of the products of which were ultimately used for the manufacture of CO_2. Now, I am not sure whether——

Mr. Dwyer: That is right, your Honor, there were, Judge, but it was not the Indianapolis plant.

The Court: Have you concluded your argument?

Mr. Karsted: Well, your Honor, I don't know whether I have made my argument very logical, so I would like to summarize it.

Our argument is that, first, Section 9(e) is severable: It requires Liquid to divest, and it has the separate purpose of attempting to see that that divested plant is still used for the production of CO_2. But, since the two provisions are severable, the failure of the last does not also mean the failure of the first. In other words, the injunction to divest, we take the position, is still in effect.

[fol. 15] The second point is that we think that it is clear in looking at the bill of complaint because it alleges that this is a conspiracy to monopolize by the acquisition of plants so that Liquid ends up in the position where it has maintained control and ownership of the plants which it has illegally acquired, and we think that when you read Section 9(e) in relation to the bill of complaint, then it is clear that they must dispose of the two plants, and that is what is meant by the judgment. We think that is also clear when you read the Section 9(e) in relation to the decree as a whole.

Now, your Honor, such divesture as it was possible to obtain from Pure is still in effect. Pure made its acquisition in a different way than Liquid, and the complaint spells that out. Whereas Liquid acquired complete plants and so forth, Pure didn't. Pure acquired the assets and the equipment, and then would buy the plants up by exclusive contract.

Now, your Honor, Section 9(e) breaks those contracts so that as far as possible we get complete divesture where necessary, divesture from Pure. But the divesture required of Liquid is different.

Now, if Liquid doesn't have to dispose of those two [fol. 16] plants, then they are just being allowed to retain the fruits by what I would call a fluke, to-wit, the fluke that the trustee was unable to find anybody who would guarantee to use the plants and the means provided.

Our third point is that to adopt the construction that because the trustee was unable to dispose of the plants to a competitor or a potential competitor of Liquid, is to ask for what we would call an irrational construction of the decree.

Our fourth point goes more, I suppose, to viewing the thing as a consent judgment. Liquid consented to this judgment, and Liquid consented to the divesture of two of its plants.

Now, I don't think that it could reasonably be said that Liquid conditioned its consent on the condition that the plants be dispossed of to its competitors or potential competitors, because if they did, then they were not only asking, they were not only consenting to something that damaged them intrinsically, to-wit, disposal of the plants, but they said, they were saying, we will only consent on condition that those plants are disposed of to our competitors or potential competitors, which would be an additional harm to them. So, your Honor, I therefore don't see how [fol. 17] it can be said that their consent was conditioned on the plants going to competitors or potential competitors.

I think all of these matters impel one to construe the decree of requiring the divesture.

The Court: Do you have a memorandum?

Mr. Karsted: No, your Honor, I don't, but I would be glad to file one with the Court.

The Court: I will hear from Mr. Dwyer.

Mr. Dwyer: If your Honor pleases, I have served upon the Government and filed with your Honor, an affidavit of Mr. Brown who was an active participant in the final negotiations leading up to the signing of the decree, as well

as a memorandum setting forth our legal position with respect to the Government's motion.

Your Honor, I shall endeavor to avoid duplication, but it will be impossible not to repeat some things in view of the statement and the argument made by my distinguished opponent this afternoon.

First of all, your Honor, I want to say that generally Mr. Karsted's argument is theoretical. Perhaps from his point of view that is a fortunate thing because he was not present during the proceedings, and he did not participate in the negotiations leading up to the decree, as I did, and about [fol. 18] which, I am sure, Mr. Karsted would concede, that I have at least better knowledge of the prior procedures than he has.

Your Honor, I shall endeavor later on to give your Honor a frame of reference into which the language of this decree fits.

Now, your Honor, first of all I should like to say that this is not really a motion for a construction of the decree. This is nothing less than a modification of the decree.

Now, your Honor has fairly well summarized the important parts of the decree, but I should like to repeat them because I think they are of great importance. In this connection, I would like to note that Mr. Karsted has nowhere in his argument pointed to any language in Section 9 which would sustain the modification of the Government, the modification which the Government now seeks. What he is asking for is in effect really an extension of the language, and truly a distortion of the language which the parties agreed upon.

Here is what we agree to, and it is found in Section 9(e) of the decree. Section 9(e) provides for the disposal of Liquid's plants at Brooklyn and Indianapolis within one [fol. 19] year from March 7, 1952, and I quote:

"Subject to the terms and conditions of subsection (e)."

Now, that is not merely subdivision 1 or paragraph 1 of subsection (e), but subject to all of the subparagraphs of subsection (e).

Paragraph 2 of the subsection requires, "Such sale to be made by a trustee to be appointed forthwith," and I stress

the word "forthwith," as I stressed the previous provision about subject to the terms and conditions of subsection(e).

Paragraph 3 states that the "disposal shall be at such reasonable prices as determined by the Court, having regard to appraisal made by the Court's appointed appraiser."

It further provides that *that* the "sale shall be made to a person having no affiliation with any of the defendants," and that includes not merely Liquid but any of the defendants, and that "such disposition shall be conditioned upon the sale to a limited or restricted group, namely, a person or persons who would operate the plant or plants exclusively for the production of CO_2 or dry ice."

[fol. 20] Now, you could read this decree from now to Doomsday, and you will find no language in it which provides for sale under any other circumstances. The parties were cognizant of the fact that the property might not be sold within a year, and we expressly say that your Honor had the power to extend the term of the trustee, so that if circumstances interfered with the sale, then your Honor, in the light of all the knowledge that had been acquired up to that time, could extend the term of the trustee, and your Honor did. You granted several extensions of time, extending the term of the trustee.

Finally, your Honor concluded that no sales had even been suggested, except for one to which I will refer later, and that these plants could not be sold within the provisions of the decree.

Now, this was a consent decree. A consent decree is somewhat different, it is a somewhat different animal than a decree entered after a contest, and after evidence had been taken and findings had been made.

We say that your Honor is limited to the language of the decree, the language which was arrived at by competent counsel representing the Government, and I might say that Government was represented by a man who has had [fol. 21] a distinguished career in this particular section of the Department of Justice and who has had perhaps a background greater than any one man in connection with the drafting of decrees, and I refer, of course, to Mr. Timberg.

Now, if your Honor were to adopt the Government's suggestion and compel Liquid Carbonic to sell its plants, you would do so without any basis at all in the language of the decree. Not only would you be without any foundation within the decree for such an act, but you would be raising questions about other provisions of this decree, such as the restriction which is imposed upon us of building no facilities within 400 miles of the plant which is to be disposed of until actually disposed of. There are other provisions in that decree which would have to be given an entirely and different meaning never understood by the parties when they entered into this agreement for a consent decree.

Now, your Honor, I have submitted in the memorandum a number of authorities, and I think that no amount of laboring on my part at this time can make any clearer what we have said in this memorandum concerning the Hughes case and the other cases. Nor can any amount of argumentation on the part of the Government change the [fol. 22] plain facts in that case. Your Honor, we feel that this is an analogous case with that case, and that there couldn't be two cases in principle more identical, that is the Hughes case and our case.

The Court: But hadn't Hughes given up all control of his stock when he deposited it?

Mr. Dwyer: Yes, he did, the option of either selling or of depositing it with a trustee——

The Court: But having deposited it, didn't he lose control of it thereafter, except to the extent he might receive dividends?

Mr. Dwyer: No, your Honor, he didn't lose control. Perhaps the most valuable, if it isn't the most integral part of control is the value which fluctuates, and Hughes in that case always could change his mind when he wanted to change his mind as to when he could have gotten the most money for the stock.

The Court: Didn't the Court support his position that he didn't have to sell due to the fact that he had actually given up all control of the stock, because he retained no right to control it except to the extent of receiving dividends?

Mr. Dwyer: Yes, your Honor, but——

The Court: And isn't that to be distinguished from our case?

[fol. 23] Mr. Dwyer: No, it isn't, your Honor. What was really at the basis of the case was not merely whether Mr. Hughes could or could not exercise some power over the theatres and the production company, which was the RKO Company, but it was a question of construction of a decree which was entered into by both parties represented by able counsel on both sides. The language was plain as the language here is plain. He could either sell or he could deposit. He chose to deposit. Then, the Government for one reason or another said that they didn't like that provision of the decree, and they wanted Mr. Hughes to sell the stock. The Supreme Court said that that in effect would be rewriting the decree and forcing upon Mr. Hughes a bargain to which he never consented.

The Court: Do you think the Court would have said that if he had retained the right to vote that stock instead of having given it up to the Trustee?

Mr. Dwyer: If the language of the decree so read, I am sure there would have been no difference in the result by the Supreme Court. Your Honor, the basic thing is the construction of language.

Now, in the light of the circumstances in each case, let me say——

[fol. 24] The Court: May I interrupt just once more?

Mr. Dwyer: Yes, sir.

The Court: Is it your contention that since the trustee was unable to get a customer who would purchase under the conditions provided for by 9(e), I believe it is of the decree, that Liquid would have the right to go back into that plant and continue to manufacture dry ice: Is that your claim?

Mr. Dwyer: That is my position, your Honor, yes.

Now, I say that, your Honor, but I want to remind you of this, and I will go into this a little more fully. We had said from the very beginning that the Long Island City plant was a high cost plant, and that eventually we would not be using it. As a matter of fact, we haven't been using it now for a considerable period of time. I don't want to be specific because I am not too positive, but I

would say that certainly we haven't been using it in over a year. Just let me say this, however, at this point: Mr. Karsted has said in effect that we would be giving up nothing if we were not compelled to sell these plants. May I remind your Honor that Section 9 required us to give up a very valuable contract with Wyandotte. We were required to terminate other contracts with other companies, [fol. 25] as specified in Section (d) or sub (d) of Section 9. There were other restricted provisions imposed upon us in Section 9 of this decree. So, it isn't fair or true to say that we are giving up nothing.

The Court: There was a decree entered by consent, and it was expected that you would have to give something up.

Mr. Dwyer: That is right.

The Court: That was the purpose of the action.

Mr. Dwyer: We gave up things without condition, and we gave up other things subject to certain terms and conditions as provided in subsection (e).

Now, let me recall to your Honor the frame of reference about which I spoke just a short while ago. This complaint was served, if memory is right, back in 1948. We answered reasonably promptly. The case was dormant for some time. Then I succeeded a former partner of mine in the matter, and I commenced proceedings on behalf of Liquid to get this case moving. I commenced the discovery proceedings against the Government. I filed the motion, if you recall, for particulars, and that initiated this case on its way towards a trial. We were prepared to go to trial, at least to get ready for trial, and your Honor, as is your [fol. 26] right and in your wisdom, asked the parties to confer.

Your Honor, we knew the expense which was involved in the trial of this case. There were various estimates as to how long it would take. The allegations of the complaint went back for 25 or 30 years, covering the, almost, the commencement of business of Liquid and of Pure Carbonic Corporation.

We eventually agreed that we would settle provided of course that the Government gave up substantially some of the things that it was demanding in the prayer. The Government asked us to divest ourselves of our plant at Brooklyn or Long Island City, and eventually at In-

dianapolis, although there was another plant mentioned in the course of the discussions.

Your Honor, I can say this of my own knowledge, that I reiterated to your Honor and to the Government counsel, and Mr. Stephens even more than I, and we said the same thing to Mr. Timberg and his associates, and my recollection is that he said this to you, Mr. Stephens, that we knew from our experience that no person would buy the plant at Long Island City. We said it was a high cost plant to operate, and we said, further, that the plant at Indianapolis was not a modern plant, and that it likewise would not be [fol. 27] sold readily to a purchaser who would operate it for CO_2 purposes and, your Honor, that was an integral part of all the discussions, that is that we or the Government was going to get somebody to operate it so that there would be competition to Liquid and to Pure within those areas. We knew that no one would be acquired, that no purchaser could be acquired, that is for these plants, and we said so to the Government, and we finally agreed that we would consent to a sale by a trustee within a limited period for a CO_2 operator. The whole Section 9, subdivision (e) is based upon that condition.

Now, the Government took the position that they had information or it had information that these plants would be bought. It was upon our insistence that your Honor provided those conditions in the decree, namely, that a trustee be appointed and that an appraisal be made. The Government at first had wanted us to sell. We said we would not sell because we said we would be merely sacrificing it if we were to sell promptly. We said you take the onus, let a trustee be appointed, and a trustee was appointed forthwith. That is the language of the decree. That was done so that the Government and our, Liquid's, respective contentions could be put to the test.

[fol. 28] The Court: I remember that contention so far as it affected the Long Island City plant. I know there was considerable talk about the cost of operating the plant, but I don't recall any such talk with respect to Indianapolis.

Mr. Dwyer: We made that condition exactly the same with respect to Indianapolis, and it is so provided in the decree, and there is no difference in the language.

Now, your Honor, there is nothing severable about the

language here, as Mr. Karsted argues. This section (e) says that the plant shall be disposed of subject to the terms and conditions. That is what it says. It doesn't say that it is severable at all. The idea was that the plants would be sold to somebody who would operate them as CO_2 plants.

Now, the factual situation as of today: Mr. Brown's affidavit points out that Liquid virtually has abandoned the Long Island City plant. If we had been permitted to sell free of the conditions back in 1952, we could have sold at a much higher price than we can sell today. We were under the terms of the decree, as we have stated, limited in our sale to one who would operate as a CO_2 purchaser. We [fol. 29] took the position, and Mr. Riker's appraisal bore out our contention, that this property had more value as real estate than it had to a purchaser who would buy it and who would have to, perhaps, either virtually remodel the entire plant or build a new plant on the site.

We are not using it now, but we should not be compelled to sacrifice this plant. We ought to be able to sell the plant when, in our opinion, it could be sold at the most profit to Liquid Carbonic Corporation.

The Court: You say that the provisions respecting the sale are not severable, and that the only condition affecting the sale by the trustee would be one which would limit itself to someone who would be going to use it for such purposes, but such a customer wasn't obtained. Apparently, then, you agree that the purpose of the sale provided for in the decree was to carry out the effect and purposes of the statute, which was to create competition by the manufacture of the same sort of commodity, that is in competition with Liquid and Air Reduction. Now, how do you reconcile that condition, with which I agree with, incidentally, with the position that having failed to secure a customer, Liquid may [fol. 30] have the right to go back into there and do what the Government claimed it was doing illegally all the time, that is to continue to monopolize this industry as the Government charges them, that is monopolizing that industry in this area.

Mr. Dwyer: No, your Honor.

First of all, your Honor, let me say this: We never agreed with the Government that there would be someone who would come in here and compete with Liquid. Nor did we

agree with the Government that the continuance of the plants in Liquid's ownership, or the operation of either of those plants would bring about either a monopoly or an illegal condition.

Let me recall this to your Honor, that the Indianapolis plant isn't mentioned at all in the decree; actually no plant is mentioned——

Mr. Karsted: Excuse me, yes, it is.

Mr. Dwyer: All our plants are mentioned in the decree, but where divesture takes place it is generally with respect to plants which have been acquired in the course of some illegal act.

The Court: Do you say that the Indianapolis plant is not mentioned in the decree as one of the two plants?

Mr. Dwyer: I did not mean in the decree, Judge, I meant in the complaint. I am sorry if I said the decree, I meant [fol. 31] the complaint. Of course it is mentioned in the decree.

The Court: Incidentally, you sought to make a distinction between the decree and one made by consent, in other words, between a decree made after trial and one by consent. Now, here we are dealing with the decree alone. I make no distinction between a decree obtained through the consent of the litigating parties and one after trial, except to the extent, of course, and that must be mentioned somewhere in the decree, that there has been no resolution of issues of law and fact in the case. We do have a decree, however, and it is to the question of the interpreting of the decree, I take it, that this application is directed. This is something in the nature of an interpretation by asking for an order on the decree within the machinery provided for in the decree itself.

Mr. Dwyer: Well, you may characterize it, or the Government may characterize it as such, but that is merely playing with words. This is not a construction of the words of the decree, this is a revision of the decree; it is compelling us to do something that we never agreed to under the decree.

[fol. 32] Your Honor, there are no findings of fact in this case. This is a contract between the parties that has the approval of your Honor. It isn't like a decree that is en-

tered after trial, where there is a finding of fact that we have been engaged in illegal activities.

The Court: I agree that there have been no findings. There has been a statement, which I spoke of before, in the decree that there has been no resolution of the issues of fact or law; no, there is no question about that. No, there have been no findings, and I realize that, but we have a decree. Apparently there is some doubt as to what it means, as to what it includes, and the Government takes the position here, apparently, that implicit in the decree is a provision requiring Liquid to dispose of the plants in view of the fact that the trustee was unable to get a customer for them. Now, they say that comes under the conditions provided for by 9(e) of the decree. You oppose that contention.

Now, I am not stating that I agree with the Government on that at all, although I am rather surprised.

Perhaps we may go off the record here.

(Discussion off the record.)

Mr. Dwyer: Well, Judge, as I said before, and I may say [fol. 33] this again, and I would like to say this on the record, I think the last thing that appears there is your statement with respect to the characterization of the motion and Liquid's position with respect to it also: If this language were ambiguous, if it were cloudy, if there was some question about the meaning of the parties, then, of course, I would say that your Honor should proceed to take evidence to find out what was meant. But there isn't the slightest doubt about the language, it is plain and unambiguous. The cases which I have cited in the memorandum we have submitted to you hold plainly that you cannot change the language of the decree in those circumstances, and that is so whether you call it modification or a construction of the language.

I think I have covered everything.

The Court: Do you want to say anything?

Mr. Karsted: May it please the Court, I would like to say a word about the decree: A consent decree, as your Honor pointed out, is a judgment of the Court. Now, it may remain a contract or in the contractual stage up to the time when it is submitted to the Court, but the parties

themselves cannot enter that, they submit that judgment to the Court, and if the Court adopts it and enters it, then [fol. 34] it becomes the judgment of the Court. There is not a case on record where any Court has gone back into the counsel chamber to ask the parties what did you mean and what did you mean.

Take the Hughes case: There is not an ounce of writing any place. All the parties who negotiated the Hughes case were present, but the Court wasn't interested in what they meant when they wrote what they agreed to. The same thing is true of all the cases. What the Court does is that it looks at the language of the judgment, the Court looks at the record, the Court looks at the general purpose which was intended to be accomplished by this situation, and then it has to reach its construction of the judgment that way.

Now, I think your Honor brought out a very good point in the Hughes case. The language in the Hughes case seems very clear now, that Hughes had the choice of either selling the stock or depositing it with the trustee. However, if it were so clear, I would like to ask how in the world could three judges as clever as Augustus Hand, and I think Coxe and Goddard, they were the other two judges, and yet those three judges came to a different interpretation of that judgment. They looked at the situation, that is, what was intended to be accomplished by the judgment, [fol. 35] and they did not merely look at the language. Then, when it hit the Supreme Court, the Supreme Court also looked at the record, and as your Honor pointed out, the Court stated, I have the decision here, it is on page 357, they said in Section 5:

"The parties and the District Court provided their own detailed plan to neutralize the evils of such ownership. From that fact alone the Court would be able to say that since the evils were neutralized by a detailed plan, maybe the Government doesn't agree to it now, but they did at one time and it does neutralize."

Then the Court was able to construe the language as saying that: "Hughes had the alternative."

However, I wonder what the Supreme Court would do in this case, that is where the trustee attempts to sell the

plants and finds himself unable to do so, and then Liquid says, now we can take the plants and again start operating. Frankly, I doubt very much if the Supreme Court would rule as in the Hughes case.

The Court: It would seem to me that Liquid agreed to recognize at the time it consented to the entry of the decree that it was willing to give up its operation of the Long Island City plant as one of the items which it was willing to [fol. 36] lose or sacrifice for the purpose of accomplishing a settlement of the case. That is the way I am looking at it. I am not sure that I agree with you, Mr. Karsted, that any good is accomplished by compelling the sale of a piece of property unless it is for the purpose, as the decree provided, of finding someone who would provide competition for Liquid. That was the basis of the action itself.

However, I would like a memorandum from you on it.

Mr. Karsted: I will be glad to submit one, your Honor.

The Court: Of course, Mr. Dwyer, you may get a copy of Mr. Karsted's memorandum, and then you may have an opportunity to reply to it, if you want to.

Mr. Dwyer: Surely we would, your Honor.

The Court: I am not too impressed by Brown's affidavit because it dwells too long and too much on what prompted him and his associates to enter into a decree. We have a decree which post-dates anything that may have occurred before, and it doesn't help us, that is his affidavit, it doesn't help us to determine what the decree means.

I don't think the language is ambiguous at all. You stated that you didn't think it was necessary to conduct a hearing [fol. 37] because there is no ambiguity. I agree there is no ambiguity in the decree, but sometimes there are things implicit in a decree which the litigating parties may not agree are implicit, and that is something I wish to think about.

Mr. Karsted: If your Honor pleases, I might point out, for example, that in the United Shoe case, with which I am very familiar because I worked on that case, the United Shoe was forced to divest itself of certain plants. There was a condition that the plants, after divesture, be used for the same purpose. Now, they could be sold by United Shoe for any purpose and the buyer could have used them for any purpose, but the theory behind divesture, as a rule,

is that you are dealing with somebody that reached a certain position by an illegal method of operation, generally by illegal acquisitions or illegal contracts or something of that sort. Now, to put it roughly, it is in order to cut them down to size that proceedings are——

The Court: It is also to prevent them from retaining, which is about the same thing, their dominance in a particular field, in a particular neighborhood.

Mr. Karsted: That is right.

The Court: I think you will find that United Shoe Machinery had no competitors. As I recall it now, they were [fol. 38] the only concern manufacturing that article in this country.

Mr. Karsted: No, your Honor, no.

The Court: Didn't they lease the equipment, the machinery which they were making, rather than selling it so that no one else could actually compete with them? Of course, nor could anyone buy the machinery. Isn't that what the situation was?

Mr. Karsted: That is right, your Honor, but that wasn't the part of United Shoe's business which the Court directed divesture, because United Shoe had one plant which was impossible to order them to divest because they had half of the plan-. Now, the Government submitted a plan, we said it could be done, but the Judge said that the plan was fanciful and refused to go along with it. The United Shoe had other plants where it manufactured eye-hooks, shoe laces, shoe horns, and things of that sort. About those the Court ordered divesture.

Now, presumably the purchaser could have used those plants in the same way that United Shoe did, but there was no requirement for them to do so.

Mr. Dwyer: I should just like to say this, that neither the United Shoe case nor the Paramount case, to which [fol. 39] Mr. Karsted referred, are at all applicable here. Both of those cases represented decrees after trial upon very specific findings of fact. In both cases, there was proof of monopoly. It is true in the United Shoe that there was a competitor, but not one to be regarded, certainly as in this case, as a nationwide competitor or the size, for instance, of Pure Carbonic.

There was no finding in this case as to whether or not

the public interest would be served by the sale of the plants in Brooklyn or Long Island City, rather, and the Indianapolis one. As a matter of fact, if your Honor pleases, if you were today to order the sale of the Indianapolis plant, you would be doing it almost in vacuum. You would not have the slightest idea of what the conditions were in Indianapolis; you would not know whether you were hindering competition or furthering competition or whether there would be no change at all.

The Court: That view seems to be an entirely fresh and new one. I participated in the conferences leading up to the consent decree, as you know, over a period of many, many months——

Mr. Dwyer: Yes.

[fol. 40] The Court: Many, many hours were taken in discussing it. I never heard that mentioned until Brown states in his affidavit that far from producing competition, we would reduce competition if we sold the Indianapolis plant because present competitors in Indianapolis are controlling the situation. I never heard that before.

Mr. Dwyer: Yes, Judge, that was always said with respect to the Middle West, and particularly that section of the Middle West. The competitors we have are Pure Carbonic, which is a defendant in this case, and the National Cylinder—I think it is the National Cylinder Gas Company.

The Court: Those are not the names mentioned in Brown's affidavit.

Mr. Dwyer: Those are the names, your Honor.

The Court: Those are not the names mentioned in Brown's affidavit.

Mr. Dwyer: Yes, your Honor, they are, Judge, he says——

The Court: Are you sure?

Mr. Dwyer: Pure Carbonic, he says, and National Cylinder.

The Court: Now, the National Cylinder Gas was never [fol. 41] mentioned in our case at all.

Mr. Dwyer: There were a lot of companies mentioned, although it may not have impressed you, but National Cylinder Gas certainly was a live thing in our discussions. We knew who our competitors were in the various areas.

The Court: We addressed ourselves in discussing the

situation out in the Middle West to zones and areas and the influence exercised over those areas by plants, say in Michigan, Wyandotte, and Chicago and other places in that general vicinity. I don't believe that Indianapolis plants were referred to at all, except in one or two cases where they were unusually large. Now, in the case of Wyandotte, that was also a defendant.

Well, I would like to have a memorandum from you.

Mr. Dwyer: All right. I have already submitted a memorandum to you, and I have served a copy on Government counsel.

Mr. Karsted: Would your Honor care to put a time and date on that?

The Court: Fix it yourselves.

Mr. Karsted: Well, ten days, so that we could get a brief in.

The Court: These cases and the procedure in anti-trust [fol. 42] cases, as you heard, are all sui generis. Take all the time you feel you need in it.

Do you think you will be able to give Mr. Dwyer a copy of it?

Mr. Karsted: Why, certainly.

Mr. Dwyer: Well, your Honor, I will tell you: I am going to be in Texas with Mr. Kalosky next week, for all of the week, so if you will serve it when we come back——

Mr. Karsted: It will be at least ten days.

The Court: Well, suppose you take two weeks from today to file and serve on Mr. Dwyer, and then you take a week thereafter to reply, Mr. Dwyer.

Mr. Dwyer: All right, your Honor.

Mr. Karsted: Very good, your Honor.

The Court: Decision is reserved, of course.

[fol. 43] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

Transcript of Hearing—June 9, 1954

Brooklyn, New York.

Before Honorable Leo F. Rayfiel, U. S. D. J.

REARGUMENT

APPEARANCES:

Leonard P. Moore, Esq., United States Attorney for the Eastern District of New York, by Alfred Karsted, Esq., Special Assistant to the Attorney General of the United States.

Messrs. Satterlee, Warfield & Stephens, Attorneys for Defendant, by James F. Dwyer, Esq., and Francis D. Kalosky, Esq., of Counsel.

[fol. 44] The Court: I have already communicated with counsel for the Government and the defendant, Liquid Carbonic Corporation, informing them of the fact that I have granted leave to reargue, and I am prepared to hear you at this time.

I might say I granted leave to reargue chiefly for the reasons set forth in the memorandum submitted by Mr. Dwyer for the defendant Liquid Carbonic Corporation, wherein he stated, among other things, that there was nothing in the original notice which would indicate that that matter would be considered in the course of the argument of the original motion, and that he wasn't properly prepared to meet that argument on that occasion.

All right, Mr. Dwyer.

Mr. Dwyer: If your Honor please, as your Honor has already stated you have granted leave to reargue the motion which was made by the Government last January which, according to the notice of motion, was for an order carrying out the final judgment.

Actually what the Government sought by that notice of motion was an order for the compulsory sale of Liquid's CO_2 plants at Long Island City, New York, and Indianapolis, Indiana.

[fol. 45] I simply want to recall to your Honor that your Honor denied the Government's motion in that respect, giving the Government leave, however, to renew the motion upon other grounds as the Government might see fit, but in disposing of the motion your Honor also granted an injunction against Liquid presumably enjoining it from operating the plants for the production of CO_2.

It now appears, however, that the Government is suggesting that the injunction should be broader than a restraint against mere production, and wishes the injunction to prohibit Liquid from any use of the plant, such as for the storage of CO_2.

The Court: I think they used the phrase "storage and distribution."

Mr. Dwyer: Yes.

Mr. Karsted: That is right.

The Court: All right.

Mr. Dwyer: Now, prior to discussing the propriety, or the power of the Court herein, to issue an injunction I should like to spend just a few seconds in stating the purpose of Section IX of the decree, that being the section involved in the pending motion.

Section IX, as your Honor knows, was designed to bring [fol. 46] about within the limitations described in that section the sale of Liquid's CO_2 plants at Long Island City and Indianapolis.

In determining the purpose of Section IX, the Court should not resort to the complaint particularly since the language of the decree is clear and unambiguous.

The Court should not assume, or draw any inferences, from the mere fact that the defendant consented to a limited divestiture, that there was an agreement that the defendant had—and I quote—"to some extent monopolized the manufacture and sale and distribution of CO_2."

I cannot express it as clearly and as vigorously as I should like, since it seems to me of great importance that the Court know that there was no agreement of any sort by Liquid that it had at any time violated the Sherman Anti-Trust Act or any of the anti-trust acts of the United States.

The consent decree represents a settlement of the conflicting and contradictory views of the parties to the liti-

gation, and no inference in my opinion may be drawn that the defendant conceded that it had violated the Sherman Act.

The Court is aware, I am sure, of the opinions and views [fol. 47] expressed by Liquid's counsel consistently and continuously during the negotiations leading up to the signing of the decree that the Government's contention that the plants would be purchased by a CO_2 operator was without foundation, and it will recall, I am sure, also that Liquid consented to a sale as provided in the decree without ever changing their views as to whether the plants would be sold to a CO_2 operator.

The purpose of Section IX is clear from the context. Competition in the areas would be increased, at least hypothetically, by the substitution of a new manufacturer therein for Liquid.

Liquid was not to be ousted from the areas except to the limited extent that there would be an opportunity within the time mentioned in the decree for another CO_2 operator to enter the particular areas for the production, distribution and sale of CO_2.

Competition, that is, a new competitor, it was believed, would tend to lessen Liquid's sales in the areas.

Now, conversely the shutting down of the plants, or the sale to a non-operator, would, hypothetically at least, not increase competition but presumably enlarge the control of Pure Carbonic and National Cylinder Gas.

[fol. 48] An injunction restraining production would therefore stultify the language and the purpose of the decree.

As we have pointed out in the memoranda submitted in support of this application, the injunction which would be imposed upon Liquid was not sought by the Government in its notice of motion and indeed Government's counsel conceded on the argument—and I refer to the transcript of the hearing of January 18th, page 10—that an injunction would constitute a modification of the decree.

We do not believe that the Government seriously urges that Liquid had notice that an injunction would be sought simply because the Court asked some questions concerning the possibility of enjoining the defendant, and particularly when the Government's counsel advised the Court that in

his opinion the Court had no power to enjoin under the decree.

Now, how then does the Court get its power to enjoin Liquid? Certainly there is nothing in the decree itself which expressly or impliedly grants that power, nor can the Court draw upon its general powers as an equity court, since there is no claim that Liquid is violating any law, has breached any contract, or is flouting the decree. Nor can [fol. 49] the injunction be supported by a claim of power under the general language of the motion seeking "such other and further relief," et cetera.

Federal rules of civil procedure contain no such provision as exists under the State civil procedure permitting "such other and further relief as to the Court seems proper in the premises." Nor does the reserve jurisdiction of the Court in Section XIII of the decree provide a source of power. And an order for the "carrying out" of the decree, as mentioned in Section XIII thereof, certainly was never intended to permit the Court to enjoin the use of property particularly when the Court has conceded, as it did in its opinion, that the Government's motion for a compulsory order of sale was not within the provisions of the decree.

Quite obviously if the Government claims that the Court may modify or amend the decree through the exercise of its reserve jurisdiction, such modification must occur only after a hearing at which witnesses may testify and documentary and other evidence may be offered, and upon which hearing the Government will have the burden of proof in showing some change of circumstances not known at the time the decree was entered into.

[fol. 50] This Court needs not to be reminded, I am sure, that an injunction is perhaps the most drastic remedy available to an equity judge.

The Court is familiar with the principles applicable when an injunction is sought to the effect that the case must be clear and the remedy must be absolutely necessary to prevent injustice.

In this case there has been no showing of irreparable harm to the Government nor, indeed, of any damage at all. The only excuse for an injunction now is that the Government would like to amend the decree to provide something

which, for reasons best known to the Government, was not mentioned when the decree was drafted by its counsel.

It is paradoxical that production at these plants should be stopped when the Court has found that there is nothing in the decree which compels Liquid to sell the plants.

Now, the stoppage of production raises questions which were never argued and provokes results which the Court possibly might not have envisioned.

Certainly it would be imperative, it seems to me, that before an injunction could be granted—assuming that the decree permitted it—that the Court inquire into the fact [fol. 51] of competition in the area. This would disclose that Pure Carbonic which, as the Court knows, is Liquid's national competitor, controls the majority of sales in Indianapolis, and that National Cylinder Gas, another large competitor of Liquid, controls the remainder of business therein. That is assuming, of course, that Liquid was to be forced to shut down its plant in Indianapolis.

Testimony would disclose that the shutting down of Liquid's Indianapolis plant would have a direct and immediate effect upon 400 or more of Liquid's customers, not to mention Liquid's employees. These customers include a number who are engaged in Government defense work, and some of them are hospitals and other institutions which care for the sick and the aged.

The shutdown, too, would occur in a season when the demand is highest, and when there is no other source of supply available to the customers, since presumably both National Cylinder Gas and Pure Carbonic would require their entire output in the area to satisfy their customers' needs. Nor would the lack be made up by Liquid from its other plants in Ohio or Illinois. This lack cannot be supplied because the entire output, as I am informed and [fol. 52] believe, of Liquid's other plants is necessary for the customers normally and usually supplied by those other plants.

Now I would like to say a word about the Long Island City plant.

We have told your Honor on other occasions, and as your Honor knows from Mr. Brown's affidavit which was submitted on the argument last January, that Liquid has not operated the Long Island City plant for more than a year.

Liquid's position during the course of the negotiations on the decree with respect to the Long Island City plant was that the plant was a high cost operating plant and would not be attractive to anybody who wanted to operate it for CO_2.

Now, I can understand your Honor and the Government perhaps asking us why, that being so, an injunction would harm us.

An injunction, in my opinion, would not harm us in the sense that it would prohibit us from doing something that we are now doing at that plant, but as a matter of principle we must oppose any injunction against any of our plants since the only basis upon which Liquid ever consented to a divestiture of its plants at Long Island City and Indianapolis, Indiana, was that the plant should be put on the [fol. 53] market within the limited time stated in the decree, for the purposes stated in the decree; namely, that some other person would come in and operate those plants.

The Court: Was the purpose of that, Mr. Dwyer, to furnish new competition in an area where, by agreement between the parties, it was determined—not decided but determined—that Liquid exercised a certain degree of monopoly?

Mr. Dwyer: No; no, it was not, Judge, and as I said, I cannot express it as strongly as I should like, since words fail me. There never was any agreement on Liquid's part that the sale, or, its agreement to the sale of the Long Island City plant or the Indianapolis plant represented a concession that Liquid had a monopoly position in those areas or that it had a position which tended towards monopoly.

The Court: There was no actual concession to that effect. I agree that there was no finding, and there was no specific agreement in the negotiations which resulted in the consent decree, to that effect. We all understand that. But doesn't that part of the decree which provides for divestiture serve in effect as an injunction against further operation in those [fol. 54] plants by Liquid?

Mr. Dwyer: No, it does not. Your Honor knows that we operated the plants all during the period, and of course when I say "the plants", my recollection is that the Long Island City plant was operated part of the time after the decree went into effect, but it was for a very short while there. Indianapolis of course has been operated right

down to the present moment. It was never intended that we should cease operations during the period when the trustee was endeavoring to sell the plants.

The Court: On the contrary it was specifically provided that you continue.

Mr. Dwyer: Yes.

The Court: And the purpose there, as I understood it, was to make it sufficiently attractive to a prospective purchaser; to make him feel that here was a going plant.

Mr. Dwyer: That is true.

The Court: With the expectation that that might attract a purchaser.

Mr. Dwyer: That is true, your Honor. We kept the plants up to the average of production as required by the decree, but I deny that you can draw from that consent of [fol. 55] Liquid to offer its plant for sale within a limited time to a specific kind of purchaser that Liquid thus agreed that it should not be able to operate the plants after the time period had expired.

The Court: Wouldn't the efforts of the trustee in effecting the sale, if successful, result in more than merely a discontinuance of Liquid's operations in those plants? Wouldn't it in addition to that furnish some new competition in the field which it didn't have before, thereby reducing such advantage as apparently Liquid must have enjoyed in the neighborhood, because it would bring somebody else into the field who would be supplying a part of the local demands and needs?

Mr. Dwyer: If the trustee had effected a sale to a CO_2 operator I am sure that that would have, first, offered additional competition to Liquid within the area and to National Cylinder Gas and to Pure Carbonic; and it would of course to some extent make it more difficult for Liquid to compete as successfully as it had been, although whether that would actually occur is a matter that none of us can determine. However, hypothetically at least that is what the purpose of the decree was.

[fol. 56] The Court: Mr. Dwyer, I didn't want to interrupt you while you were consulting some notes that you had——

Mr. Dwyer: Yes.

The Court: —but I want to ask you now whether that

paper which you have been consulting will be made available, or a copy of it made available, to the Court.

Mr. Dwyer: Yes, Judge. As a matter of fact this is what it is. As I prepared my argument yesterday I wrote it out and had it typed, so that what the Court Reporter has now is a copy of this paper.

The Court: Very well.

Mr. Dwyer: I spent some time yesterday doing this. I was trying to economize in the use of words, and trying to make my argument as concise as I could.

The Court: I would like to say this before you continue. I don't want to limit you at all. We have plenty of time.

The Government in the notice or memorandum to the Court stated, as you have indicated at the opening of your argument, that the Government feels that the injunctive relief granted by the Court in its decision should have extended beyond the limits contained in the decree.

You referred to the question of storage and distribution. [fol. 57] I might say that after my decision was filed I realized that I hadn't gone far enough, because in order to be consistent I would have had to include storage and distribution.

You have a plant out at Belleville, New Jersey——

Mr. Dwyer: Belleville, New Jersey.

The Court: —and it would have been a simple matter if you chose to follow the injunctive order to bring the product in from Belleville for storage and distribution from the Long Island City plant—as much as you had done before, and possibly even more because the plant at Belleville is so much larger.

So that it had been my intention several days after I filed my decision to modify it to the extent that in addition to prohibiting production I would have also prohibited storage. I might not have used the word "distribution," because I regard distribution as something that can be effected from storage facilities there.

I thought I would tell you that now. I am not wedded to that because you have made some points there that I am going to consider of course, but I thought I would state it to you now.

Mr. Dwyer: All right. Just one final word, your Honor.

[fol. 58] An order enjoining us from producing CO_2 particularly at Indianapolis is economically a much harsher penalty than an order to sell the plant.

There are, as you have recognized in your opinion no grounds in the decree for a compulsory order of sale but we are, nevertheless, by virtue of your decision, if an order is entered thereon, required practically to maintain a plant which economically is of no value to us. We have the cost of maintenance, which could be substantial. When we can sell it at what Liquid thinks is a reasonable or a fair price is something that perhaps would take considerable time to determine. I don't know what the real estate market is in Indianapolis at this moment, or whether real estate operators feel that the market is going to be better six months from now or a year from now or what the situation is. But a restraint upon production is a much heavier penalty than an order to sell the plant.

The Court: I assume that what you say about Indianapolis would be equally true of Long Island City.

Mr. Dwyer: If we were a producer.

The Court: If it were a good paying plant. And if that be so, wouldn't it have been even more—more—onerous [fol. 59] on Liquid if the trustee had sold the plant?

Mr. Dwyer: No, it would not have been more onerous.

The Court: Because not only would it not have been able to produce anything, but it would have brought in new competition.

Mr. Dwyer: No, it would not have been more onerous, your Honor, because we would have sold the plant under the decree, we would have obtained the purchase price, and we would no longer have had the cost of the maintenance of the plant. We just can't shut it down and let it stay there. Somebody has got to keep the plant in a reasonable condition. We don't know whether somebody else who might want to operate it for CO_2 purposes would be available next week or next month or next year. We don't know whether a prospective buyer who is not a CO_2 operator would appear on the scene next week, next month or next year but we, certainly as reasonable business people, have to keep that plant in reasonably good condition.

The Court: Well, you can go back and continue your

argument. I am going to give Mr. Karsted a chance to reply of course. If you have something else that you wish to discuss you may do so, Mr. Dwyer.

Mr. Dwyer: Just one moment. I think I have said all [fol. 60] I have to say.

In your decision, your Honor, you denied the Government's motion for a compulsory sale order by giving it leave to renew the application.

The Court: Yes.

Mr. Dwyer: Now, I don't know on what basis your Honor gave the Government the further opportunity to compel us to sell the plant except that I can assume that——

The Court: I can answer that very simply by saying this——

Mr. Dwyer: Yes, sir——

The Court: Chiefly this was the reason. Having decided *the* enjoin the production at the plant, and because of the contention by the Government that it was difficult to provide policing for the purpose of finding out whether you would actually obey or violate that injunctive order—when I say you of course I mean Liquid—I felt that the Government upon learning that Liquid was actually violating the order enjoining further production might apply for an order directing the sale of the premises to make sure that the premises could not be used for that purpose, all of which I thought, at the time I decided it, was a part of the decree [fol. 61] itself.

Incidentally, you stated earlier in your argument today that you did not think I had a right to—you didn't put it quite that way—consider the complaint itself in deciding the Government's motion. Well, if I had considered the allegations in the complaint, the specific allegations and charges in the complaint, I agree with you that you would be right.

I considered the complaint only for its general objective; what it was designed to accomplish; not what it charged Liquid or its co-defendants with doing, but what its ultimate objective was. Not only the complaint, but the statutes involved too. I considered all those things.

Have I made myself clear with respect to the right to renew the application?

Mr. Dwyer: Yes.

May I just say in response to that, your Honor, that as I understand it then the Government came to you and asked for an order compelling the defendant to sell the plant.

Your Honor, for the reasons you stated, decided that the plant should not be sold, but that Liquid should be enjoined from using the plants, and since this morning's discussion [fol. 62] your Honor apparently has agreed with the Government, or at least you have indicated that you might agree with the Government in its position that the restraint should be as broad as the Government now says it wants it now, against production, distribution or storage.

The Court: If I adhere to my decision.

Mr. Dwyer: Yes.

The Court: Yes.

Mr. Dwyer: That is right.

The Court: I believe it ought to encompass more if I adhere to that decision.

Mr. Dwyer: Now, it seems to me that that is a rather anomalous situation, your Honor, when the Court grants relief which was not sought by the Government and which, at least at first blush, the Government thought you had no power to grant, and in effect the reason behind the granting of injunctive relief seems to be that your Honor feels that we should be penalized in some way because of the general purpose of the complaint.

The Court: No, I don't, Mr. Dwyer. Let me make myself clear. The gravamen of this whole matter I think is this. Liquid—and let's confine ourselves to Liquid alone now—[fol. 63] Liquid, by agreeing to a consent decree, agreed, among other things, that one of the things it was willing to do to effect a settlement of the controversy was to stop producing CO_2, dry ice, in the Long Island City area and in Indianapolis and—and let's confine ourselves to Long Island City—to permit the Government through a court appointed trustee not only to limit its operations in Long Island City, but to try to bring someone else in who would take over operations at that plant.

The Government failed; that is, the trustee failed, to effect such a sale.

So that at least part of the relief it sought, I thought—the Government did not agree with me apparently—I thought the original argument constituted a modification of the decree. I did not agree with them. As a matter of fact the observation which I made during the course of the argument, or, the question I asked, rather, was one that I expected an affirmative answer to.

I assumed that somewhere in the decree there was a provision to the effect that the Government under that decree was entitled to nothing less than relief which would result [fol. 64] in the discontinuance by Liquid of its operation in Long Island City.

May I say parenthetically, I was rather surprised when I got a unanimous answer there.

However, I felt that since that was, as I thought it was, the gravamen of the complaint so far as Long Island City is concerned the Government was entitled to an order enjoining Liquid from further operations at the plant.

I denied the Government's application for relief in the shape of an order compelling the sale for a number of reasons, but chief among them was that I regarded the seizin- of the property itself, the title of the property, as not the important thing, unless it was sold to someone who would operate in competition, but rather I regarded the discontinuance of the operation as the important thing, and I did not think that a sale under conditions that might work a hardship on Liquid should be directed or compelled.

But having decided that the Government was entitled to an order enjoining further operations, and because of the Government's statement to the effect that it would be a difficult thing to police the plant for the purpose of finding out whether there was a continued compliance, I felt that they [fol. 65] ought to have the right to come in, if such a condition should develop, and ask for a sale so that policing operations might not be necessary and that the effect of what I thought was implicit in the decree could be carried out.

Mr. Dwyer: Well, your Honor, I think the point at which we differ is this. You said at the opening of this particular colloquy that Liquid had agreed that it should stop production at these plants. In my opinion we never made any such agreement. What we agreed to was that we would put the

plants up for sale to a CO_2 operator, and that is all we agreed to. We never agreed to the cessation of the production.

Now, of course the mere fact that we would have ceased to produce had a buyer been found does not mean that we would have agreed to a cessation of use, no buyer having been found.

That, I think, is the point on which we have a basic difference.

The Court: Suppose I give Mr. Karsted a chance to address himself to his side of the question.

Mr. Dwyer: Surely.

Mr. Karsted: Your Honor, I don't plan on saying much because I believe I have put most of what I want to say in our original memorandum and in the memorandum that I [fol. 66] filed just last week.

There is one point I do want to address myself to, though, and that is Mr. Dwyer's statement that in the argument last time I conceded that an injunction would be a modification of the judgment. I think, if I recall my words correctly, I said in answer to your question, "I am afraid that it might be a modification."

I don't think I could concede something that is for an upper court to decide.

Now, I still don't know whether or not your Honor has interpreted or modified. I know that your Honor purported to modify, or, purported to interpret, the judgment, and I think you properly did so. I think you interpreted it in the light of everything surrounding it; the complaint, what the judgment was driving at, and so forth. I don't think your Honor modified the judgment.

The Court: I don't think so either.

Mr. Karsted: But I don't know what an upper court might do. An upper court might say that it is a modification. But I wouldn't concede that it would be a modification because I could not concede such a thing.

The Court: Incidentally, Liquid stressed the Hughes [fol. 67] case as one which is applicable here, and I don't think it is at all, because Hughes was given a choice of alternatives—two in number—one of which required the sale of his stock interest, and the other required the deposit of the stock with a court-appointed trustee who would hold it

with all the powers that Hughes could have had, voting powers and everything else, so that Hughes had no control whatsoever over the stock, except the right to receive dividends which, in my opinion, he had no right to vote to declare.

In other words, the Court said to him, "Now, this is what must happen and you either sell that stock or surrender your control of it without selling it," and he chose to surrender his control.

I don't think the facts are similar at all.

Mr. Dwyer: Your Honor, the principle of the case is that the Court cannot change the terms of the decree consented to by both parties.

Hughes had agreed that he would either sell the stock or put it in a voting trust until sold, and then the Government went back to Judge Hand and said, "until sold" means until sold within a reasonable time, and Judge Hand agreed with the Government, and in my opinion that would seem [fol. 68] to be not an unreasonable attitude to take—that that is what the parties meant—but the Supreme Court of the United States disagreed with Judge Hand and said, "No, he merely said he would either sell the stock or put it in a voting trust. You have compelled him to sell and you cannot change the decree to impose upon him a mandatory sale."

Now, we agreed to a limited mandatory sale of our property within one year by a court-appointed trustee to a designated buyer and we agreed to no more, and there is where the principle of the Hughes case applies.

The Court: Except that in the Hughes case what the Court really decided was that Hughes' control over the corporation might have an effect which the Court felt was violative of any such statute and wanted to be sure that he did not control its operations, and I think that they succeeded in preventing his control of operations merely by requiring him to deposit with a trustee under a voting trust that stock so that he could not exercise control. I think that was the gravamen there.

However, I believe I interrupted you, Mr. Karsted. I am sorry.

Mr. Karsted: Well, it is perfectly all right.

Since we are on the Hughes case I would like to say that

[fol. 69] the Supreme Court also said that in that case the Government argued the case on the broader point and therefore found that the Court had power to make Hughes sell, and the Supreme Court went into that point and said, "However, that argument fails because the judgment without modification took care of that situation."

We think it is implicit that if the entire purpose of the judgment would have failed the Supreme Court would not have decided the Hughes case as it did.

There is case upon case where the courts have had alternative ways of deciding judgments—of interpreting judgments—and in every case the Court has always said that a judgment will be interpreted to achieve justice or to carry out the purpose of the parties if that purpose can be ascertained.

Now, if the purpose can be ascertained by looking at a subsidiary underlying document, then regardless of the precise wording of the judgment the Court will interpret that judgment to carry out what the parties wanted to carry out in the judgment, and I think your Honor did perfectly right in interpreting the judgment that way.

The Court: The difference between the Court and Mr. Dwyer and you and Mr. Dwyer is that Mr. Dwyer says he [fol. 70] doesn't think that Liquid has agreed to that.

Mr. Dwyer: I say that if you are going to look at things you must look at the entire record. You must take into consideration Liquid's denial of the allegations of the complaint and Liquid's assertions at the time the decree was entered into that the sole purpose was to save money.

The Court: I have taken that into account. I went farther than that I think when I said that I did not consider the charges made by the Government. So it wasn't even considered, and it wasn't necessary to consider Liquid's denial. I did not consider, as far as the plaintiff was concerned, anything but the pur*pur*pose of the action itself; the general purpose.

Mr. Karsted: And, your Honor, I believe in the Swift case the Supreme Court went further and pointed out—that was also a consent judgment in which the defendant specifically denied every allegation in the complaint, with a more specific wording than is in our present judgment—still the Supreme Court said that in interpreting that judgment

it is necessary to look at the complaint—at the allegations in the complaint.

The Court: Well, possibly for the purpose of acquainting [fol. 71] the Court with the general nature of the charges. But I did not consider even that. I just considered the fact that the Government generally charged the defendants with having violated the anti-trust statutes and that the parties got together and agreed to a decree which made reference to certain of the charges but provided for a measure of divestiture and I think the cancellation of certain contracts and I believe also for exclusion, voluntary exclusion, from certain geographic areas, particularly in the West, as I recall it now. I haven't examined the decree for quite some time. The only part of the decree we are concerned with here, it seems to me, is IX(e).

Mr. Karsted: I believe so, your Honor.

Well, then I understand that—I don't really make this part of my argument, Mr. Dwyer, but Mr. Kilgore down at the Department told me that at the time when this provision was being discussed, that Liquid went ahead and enlarged its productive capacity in Illinois, I believe it was, for the precise purpose of being able to take care of that demand that would be created when the Indianapolis plant was removed from Liquid. Now, as I say I don't put that in the record. I don't know. I am just informed that——

[fol. 72] Mr. Dwyer: Well, I don't know that that is quite accurate. I think that there was an enlargement of the plant at Urbana, Ohio.

Mr. Karsted: That may have been it.

Mr. Dwyer: But I don't think that that necessarily was done to fend off any diminution in product at Indianapolis, Indiana.

The Court: As a matter of fact it might have been under construction at the time we were negotiating. I don't recall.

Mr. Dwyer: I think it was. The decree had a specific provision to the effect that we could complete the construction of that unit.

The Court: Did you want to add anything now to your statement, Mr. Dwyer?

Mr. Dwyer: There is one thing that I fail to recall, Judge. Perhaps you, Mr. Karsted, can refresh my mind.

You said that Mr. Karsted said on the argument that it

would be difficult to police the plants should an injunction be granted, and I have no recollection——

The Court: I don't remember whether it was said in the argument.

Mr. Karsted: That was in my brief.

[fol. 73] The Court: It may have been covered in the memorandum. I have forgotten where, but I did read or hear somewhere that complaint was made that "it would be difficult for us to check and find out whether they are actually doing that there," and that is one of the things I give consideration to of course.

Mr. Karsted: That was in our brief and that largely, your Honor, is what impelled me to take the stand which I did when your Honor asked me the question as to whether an injunction wouldn't do the same thing. We are afraid that if that is done in one case then in every case where we get a divestiture provision the defendant might be able to switch that around into an injunction by pointing out that an injunction will accomplish the same thing that the divestiture will.

Mr. Dwyer: Well, I don't know whether the Government is happy or not with your decree or your decision in view of what Mr. Karsted has just said——

Mr. Karsted: We would prefer the divestiture of course.

The Court: You mean a physical parting with the possession?

Mr. Karsted: I think so, for precedent purposes and so forth.

[fol. 74] The Court: Well, I don't know, frankly, what the current condition of the real estate market is, but I don't mind telling you that I felt that since they were not actually producing anything there it wouldn't be fair to require the sale under conditions which might work a financial hardship on them.

Mr. Dwyer: You mean the Long Island City plant?

The Court: The Long Island City plant particularly. I don't know anything about Indianapolis.

Mr. Dwyer: Indianapolis is producing to its capacity, and if it is shut down, as I said before, there is going to be great hardship in that area because people who get CO_2 are not going to get it any longer.

The Court: As a matter of fact if Long Island City were producing at capacity the only thing that Liquid would succeed in doing would be to lose more money.

Mr. Dwyer: That is right.

The Court: Because it is a very uneconomical plant?

Mr. Dwyer: That is right, and that is the reason why it had not been operated.

I would like to summarize briefly these arguments, your Honor.

The Court: Yes.

[fol. 75] Mr. Dwyer: First, the decree itself in our opinion furnishes you no power to enjoin us.

Second, a sale after the plant has been closed down defeats the purpose of the decree. The purpose of the decree was to give Liquid during the period when the trustee was endeavoring to sell the plant the highest possible value because we were keeping the plant up by producing CO_2 at that plant. Now, if we are enjoined from using the plant and we sold the plant months or years hereafter, obviously the value of the plant has been diminished and its use to somebody else has been impaired.

The Court: Are you speaking now of both plants?

Mr. Dwyer: I am talking particularly of Indianapolis.

The Court: All right.

Mr. Dwyer: Now, our consent to a sale of these plants by the trustee within the one-year period was conditioned upon our right to use the plants and to keep them up to the average of our productive capacity when the decree was filed.

The Court: And during the time when the trustee was seeking to sell the plants.

Mr. Dwyer: And during the time when the trustee was [fol. 76] seeking to sell the plants, yes, sir.

Now, finally may I say that I have read again the cases that we cited in our brief—the cases the Government cited and that we cited. As a matter of fact to some extent we rely upon the same cases, as you heard this morning, and our different views of what the Hughes case means, but there is also a case that I have cited in this most recent memorandum to you—the case of Ford Motors vs. United States of America. It is a case very similar to, if it is not

almost identical in factual detail with the Chrysler case which was cited in our original memorandum, except that the decision of the Supreme Court in the Ford case was different from its decision in the Chrysler case.

In the Ford case Ford had consented to a decree in a Sherman Act proceeding or action. It had agreed not to affiliate with a finance concern, but there was a provision in the decree providing that the relief—not the relief, but that the restraint should be lifted if the Government did not get a similar decree against General Motors Corporation restraining General Motors from having any relation with General Motors Acceptance Corporation, and there was a [fol. 77] date fixed by which the Government should obtain that order against General Motors. It was some time in 1940.

The Government failed to get it and Ford consented to an extension of the time during which or by which the Government should obtain that order until some time in 1945, and then finally the Ford Motors said, "We will go along no further with you. You either get the order against General Motors by the date now stated or else we will ask the Court to relieve us from the restraint of affiliation with the finance company."

The Government did not get a decree against General Motors. Ford Motors went into the District Court to be relieved of the restraint imposed by the decree. The District Judge denied Ford's application and granted a cross motion of the Government for a further extension of time.

The Supreme Court of the United States reversed the District Judge and said the parties had agreed to a specific date by which the Government should do something, failing which Ford was to be relieved from the restraint, and that having failed to obtain the relief against General Motors Corporation, the Judge had no power to extend the time during which the Government could get that relief, and it [fol. 78] granted Ford relief from the restraint imposed by the decree.

The Court: Of course we don't have the question of extension here. I could see that point if the Government

applied in this case for one or a series of extensions of the time of the trustee to effect that——

Mr. Karsted: Yes.

The Court: —to effect that sale. That would be somewhat different.

Mr. Dwyer: In principle what the Government is doing here is asking you to enjoin us, when it never asked you to enjoin us in the original decree.

The Court: Well, they may not have asked specifically for injunctive relief against that because there was a general purpose of that whole action in the prayer for relief which encompassed a situation which was nationwide in its scope, and finally after a series of conferences they narrowed it down to certain plants.

Incidentally, you had one defendant there, but you have a series of defendants here. There were patent matters to be considered in this case. There was Air Reduction to be considered too, and operations by one in competition with the other throughout the United States. In some places Air [fol. 79] Reduction had a more favorable position than Liquid, and in other places the reverse was true.

You also had a situation which was different in this respect, that you were getting supplies of a finished product which I believe was a by-product in both instances from two tremendously large producers. One was the chemical concern in Michigan——

Mr. Dwyer: Wyandotte.

The Court: —Wyandotte, and the other was this Philadelphia Publicker, I believe, where an agreement was made to the effect, I think, whereby you were to cut down to something like 50 per cent, 40 per cent, or 30 per cent, the volume of your purchases, and make the remainder available.

All of these things were details which had to be worked out.

In the other case you had a single defendant and a single objective, and it was much easier to——

Mr. Dwyer: I don't think, your Honor, that that is a fair summary of the Ford case really.

Incidentally, while Ford was a single defendant there,

your Honor, there were companion cases against Chrysler and General Motors Corporation——

Mr. Karsted: That is right.

[fol. 80] Mr. Dwyer: —involving the same thing, and actually what the Government argued in the Ford case, and what the Court accepted, was that an extension of time would in effect be following out the broad purpose of the decree which was to stop these large motor companies from dominating the finance——

The Court: The financial end of it. I understand.

Mr. Karsted: The Government had to ask for one extension after another, after another, after another. Why that General Motors case was not filed I don't know. Five or six years went by and still the General Motors case was not filed, and the Court said, "That is enough."

Mr. Kalosky: They first had a civil case. They tried to get a consent decree but could not get one. Then they jumped over to the criminal side. They were always trying to get a consent decree.

The Court: Did they believe that they could stimulate action in the civil case by the criminal case?

Mr. Dwyer: I don't think that that is a new policy to follow in Justice. They first hit you with the big stick and then they come around with relatively a peppermint candy stick.

Mr. Karsted: I think it was the Court who tried to stimulate the Government in getting the General Motors case [fol. 81] filed.

Mr. Dwyer: Well, the Government actually did file the case against General Motors but never proceeded with it.

Mr. Kalosky: I think they tried to get a consent decree first.

The Court: Do you want to submit any further memoranda?

Mr. Dwyer: No, I don't believe so, your Honor.

The Court: All right, then I reserve decision on it.

Do you have anything that I don't have or that Mr. Dwyer does not have a copy of?

Mr. Karsted: No. Well, your Honor, maybe this is—I would like to submit a proposed order. I don't know whether your Honor is going to——

The Court: You mean an order granting leave to reargue?

Mr. Dwyer: No, I don't think it is that, Judge. I think he is more optimistic.

Mr. Karsted: The way we look at it, your Honor, your order still stands. I mean your decision still stands.

The Court: Well, having granted leave to reargue what [fol. 82] would be the purpose in signing an order without indicating now that I am going to——

Mr. Karsted: This is a proposed final order in the event that the Court does not change its decision.

Mr. Dwyer: Don't you think you ought to wait until the Judge has expressed his views on that? I don't think it would save any time.

(Discussion off the record.)

Mr. Karsted: The only thing is, your Honor, I get up here to New York——

The Court: You are addressing yourself now to the question of convenience?

Mr. Karsted: Oh, yes, your Honor.

The Court: You can have your New York office do it.

Mr. Dwyer: You will have plenty of time.

Mr. Karsted: Well, I could do that. I could have the New York office do that.

(Discussion off the record.)

(Reargument closed.)

[fol. 83] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 9179

UNITED STATES OF AMERICA, Plaintiff,

v.

THE LIQUID CARBONIC CORPORATION, AIR REDUCTION COMPANY, INCORPORATED, Pure Carbonic, Incorporated, Wyandotte Chemicals Corporation, and International Carbonic Engineering Company, Defendants

COMPLAINT—Filed June 24, 1948

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act," to prevent and restrain continuing violations by them, as hereinafter alleged, of Sections 1 and 2 of said Act.

2. The Liquid Carbonic Corporation, and Pure Carbonic, Incorporated, corporations herein named as defendants, transact business within the Eastern District of New York.

[fol. 84] II

Definitions

3. The term "CO_2" as used herein means carbon dioxide in the form of gas, liquid, or both.

4. The term "dry ice" as used herein means solid carbon dioxide.

III

Defendants

5. The Liquid Carbonic Corporation, hereinafter referred to as Liquid, is hereby named a defendant. Liquid was organized in 1926 under the laws of the State of Delaware as successor to Liquid Carbonic Company, an Illinois corporation, organized in 1888. Its principal place of business is at Chicago, Illinois.

6. Air Reduction Company, Incorporated, hereinafter referred to as Air Reduction, is hereby named a defendant. Air Reduction was organized under the laws of the State of New York in 1915. Its principal place of business is at New York City, New York.

7. Pure Carbonic, Incorporated, hereinafter referred to as Pure, is hereby named a defendant. Pure was organized in 1929 under the laws of the State of Delaware by Pure Carbonic Company of America, (which itself was controlled by Air Reduction) as an operating and sales organization. In 1936 Pure Carbonic Company of America was dissolved and Air Reduction acquired and still owns all the outstanding stock in Pure. The principal place of business of Pure is at New York City, New York. Wherever the term Pure is used herein in relation to activities, understandings, arrangements or agreements entered into, consummated, performed or executed prior to the time its stock was completely owned by Air Reduction, such term shall refer to Pure Carbonic Company of America as well as to Pure.

8. Wyandotte Chemicals Corporation, hereinafter referred to as Wyandotte, is hereby named a defendant. [fol. 85] Wyandotte was organized under the laws of the State of Michigan by the filing of a plan and agreement for statutory consolidation dated November 24, 1942, made between the Michigan Alkali Company, a Michigan corporation organized in 1942, and the J. B. Ford Company, a Michigan corporation organized in 1928. Its principal place of business is at Wyandotte, Michigan. Wherever the term Wyandotte is used herein in relation to activities, understandings, arrangements or agreements entered into, performed or executed prior to the said consolidation, the said term shall also refer to its predecessor Michigan Alkali Company.

During all the times herein mentioned, Wyandotte has owned and operated the plant with the largest individual capacity for the manufacture of dry ice in the United States.

9. International Carbonic Engineering Company, hereinafter referred to as Engineering, is hereby named a defendant. Engineering was organized in 1929 under the laws of the State of Delaware and is solely a patent holding company. Its principal place of business is at Wilmington, Delaware.

IV

Trade and Commerce

10. CO_2 and dry ice have many varied and important uses. Among other things, CO_2 is used in the carbonation of beverages; in mechanical refrigeration; in fire fighting apparatus; in the inflation of life rafts; in the rapid ageing of cement products; in the production of rubber articles, including sponge rubber; and in mining, as a substitute for high explosives. Dry ice is used as a refrigerant, to freeze and preserve foods and other products in transportation and storage; in airplane and bridge construction to shrink metal parts; in oil viscosity tests; in the manufacture of neon signs and radio tubes; in automobile manufacture, in making expansion fits of valve seats in engine blocks; and in the manufacture of various chemicals.

[fol. 86] 11. More than 200,000,000 pounds of CO_2 with a sales value exceeding $15,000,000, and more than 700,000,000 pounds of dry ice, with a sales value exceeding $20,000,000 are produced annually in the United States for sale and distribution as hereinafter alleged. Demand for both CO_2 and dry ice is and has been greatly increased since commencement of the recent war. Current supply is inadequate to meet this demand. Pure and Liquid are the only companies in the United States having nationwide distribution of both CO_2 and dry ice. With Wyandotte, these defendants sell over 75% of all the CO_2 and dry ice produced for sale and distribution in the United States. Pure and Liquid own and operate plants for the manufacture of CO_2 and dry ice in a number of states of the United States, and in the regular course of business Pure, Liquid and Wyandotte sell and ship substantial quantities of CO_2 and dry ice into states other than the states of manufacture.

Background of the Conspiracy

12. In 1928, Liquid entered upon a program to eliminate competing manufacturers and distributors of CO_2 and dry ice by acquiring their assets, plants and properties, and procuring the dissolution of such companies. Between 1928 and 1932, Liquid acquired the assets, plants and properties of other competing manufacturers and distributors of CO_2 and dry ice, including:

General Carbonic Company, of New York;
The Clarke Chemical Company, of Ohio;
Keystone Carbonic Gas Company, of Pennsylvania;
Western Carbonic Gas Company, of California;

and also acquired the entire plant, machinery, equipment and properties of the DryIce Corporation of America, in Los Angeles, California, and machinery and equipment owned by the DryIce Corporation of America relating to the manufacture and storage of dry ice, located in the [fol. 87] following cities:

Albany, New York,
Atlanta, Georgia,
Cambridge, Massachusetts,
Cincinnati, Ohio,
Chicago, Illinois,
Cleveland, Ohio,
Denver, Colorado,
Jacksonville, Florida,
Kansas City, Missouri,
Long Island City, New York,
Maspeth, New York,
Minneapolis, Minnesota,
New Orleans, Louisiana,
Philadelphia, Pennsylvania,
Seattle, Washington,
St. Louis, Missouri.

13. In 1929, Air Reduction entered upon a program to eliminate competing manufacturers and distributors of CO_2 and dry ice by acquisitions of their assets, plants, and properties. In that year, Air Reduction organized the Pure Carbonic Company of America for the purpose of acquiring the assets of The Compressed Carbonic Company, of Maryland (including the capital stock of the Compressed Carbonic Sales Company, of Delaware and the New York Compressed Carbonic Sales Corporation, of New York) and Globurn Construction Company, (or Globurn Carbonic Company), of Delaware, and such assets were acquired by Pure Carbonic, Inc., then the operating and sales subsidiary

of Pure Carbonic Company of America. Between 1929 and 1932, Pure acquired the assets, plants and properties and procured the dissolution of competing manufacturers and distributors of CO_2 and dry ice, including:

Carbonic Gas, Incorporated, of Cincinnati, Ohio;
Carbonic Gas, Incorporated, of Detroit, Michigan;
Natural Carbonic Gas Company, of New York;
Natural Carbonic Ice Company, of New Jersey.

14. In 1929 Air Reduction and Liquid jointly organized under the laws of the Republic of Cuba, the Liquid Carbonic Corporation of Cuba, and since that time have each owned one-half of the outstanding capital stock, have each elected one-half of the total number of directors and have jointly controlled the operation of said company. In May 1940, the Liquid Carbonic Corporation of Cuba purchased from the defendant Engineering all Cuban letters patent and patent rights to apparatus methods, processes and uses of dry ice owned or controlled by Engineering.

[fol. 88]

V

Offenses Charged

15. Beginning no later than the year 1932 and continuing thereafter up to and including the date of the filing of this complaint, the defendants have been engaged in a combination and conspiracy to restrain and monopolize the trade and commerce among the several states of the United States in CO_2 and dry ice and have attempted to monopolize and have monopolized such trade and commerce in violation of Sections 1 and 2 of the Sherman Act. The defendants are continuing and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted. The aforesaid combination and conspiracy, attempt to monopolize and monopolization and certain of the acts, acquisitions, contracts, agreements and understandings which formed a part of and were used in effectuation thereof, will be hereinafter more fully set forth and described.

16. In 1932 by agreement, understanding and arrange-

ment among Pure, Liquid and Wyandotte, and the American DryIce Corporation, Pure acquired the trucks, cylinders and other property used in the sale and distribution of CO_2 and dry ice of the Delancey Chemical Corporation and divided the said trucks, cylinders and property among the said companies. At the same time Pure also contracted to thereafter take the entire annual production of CO_2 and dry ice from the Delancey Chemical Corporation; thereby complet-ly eliminating the said Delancey Chemical Corporation as a competitor in the manufacture and distribution of both CO_2 and dry ice.

17. Thereafter for the purpose of eliminating competition and monopolizing the manufacture, distribution and sale of CO_2 and dry ice, Liquid has acquired the assets, plants and properties of other competing manufacturers [fol. 89] and distributors of CO_2 and dry ice, including:

Bishop & Babcock Manufacturing Company, of Ohio;
Bishop & Babcock Sales Company, of Ohio;
Zero Ice Corporation, of Michigan;
S. G. Parker Company, of Massachusetts;
The Saxet Carbonic Company, of Texas;
The National Carbonic Company, of Texas;
Washington Liquid Gas Company, Inc., of Montana and
J. E. Crosbie, Inc., of Oklahoma;

also has acquired assets, such as cylinders and equipment of other companies, including:

Western Carbonic Company, and Western Carbonic & Chemical Company, of Kansas;
National Cylinder Gas Company, of Delaware; and
Pacific Silicate Company, Ltd., of California;

also has acquired the entire corporate stock of Carbonic Gas and Service Corporation, of New York, a distributor of CO_2 in the New York area; and also has contracted to acquire the entire production of CO_2 and dry ice of other companies.

18. Since 1932, for the purpose of eliminating competition and monopolizing the manufacture, distribution and sale of CO_2 and dry ice Pure has acquired the assets, plants, and

properties of other competing manufacturers and distributors of CO_2 and dry ice, including:

Purvis Carbonic Equipment Company, of New York;
Nu-Ice Company, of Nevada;
Crystal Carbonic Laboratory, of Georgia;
Crystal Carbonic Laboratory, Inc., of Delaware;
Alabama Carbon Dioxide Ice, Inc., of Alabama;
New York Carbonic Company, (Herman J. Hegt, Proprietor) of New York; and
Solid Carbonic Corporation of Iowa;

also has acquired assets, such as cylinders and equipment of other individuals and companies, including:

Carbo-Frost, Inc., of New York;
United States Industrial Alcohol Company, of California;
American Commercial Alcohol Corporation, of Delaware;
Chemical Gases, Incorporated, of New York;
American Distilling Company, of California;
Pennsylvania Alcohol Corporation, of Pennsylvania;
Carbonic Ice Company, (J. L. Weaver, Proprietor) of Pennsylvania;
J. E. Baker Company, of Pennsylvania;
Carbonic Gas Company of America, Inc., of New York;
Capital Carbonic Company, Inc., of the District of Columbia; and
California Carbonic Company, of California;

[fol. 90] also has acquired the entire corporate stock of Braunstein Bros. Carbonic Sales Corp., of New York, a distributor of CO_2 in the New York area; and also contracted to acquire the entire production of CO_2 and dry ice of other companies.

19. In 1934, Pure purchased the entire assets, plants and properties of the American Dry Ice Corporation, including all the corporate stock of the Adico Development Corporation, hereinafter called Adico, a corporation holding patents relating to the manufacture and use of dry ice. Thereafter Pure sold one-third of the corporate stock in Adico to Liquid and sold another one-third of the corporate stock in Adico to Wyandotte.

20. At that time Engineering held the only important patents in the dry ice field competing with those of Adico. Liquid, Pure and Wyandotte therefore entered into an agreement with Engineering to pool the patents of Adico with those of Engineering. On June 12, 1934 a new corporation, International Carbonic, Incorporated, hereinafter called International, was organized. Adico subscribed to three-fifths of the stock in that company, and Engineering subscribed to the other two-fifths of the stock in International. Adico and Engineering thereupon granted to International exclusive licenses to all patents, rights and applications owned or controlled by each of them, with the right of International to grant sub-licenses under any and all of said patents, rights and applications. International granted such sub-licenses to Liquid, Pure and Wyandotte.

21. During the time that International had such right to sub-license any or all of Adico and Engineering patents, rights, or applications, it issued no sub-licenses for the manufacture or sale of dry ice to any concern other than concerns that had been previously licensed by Adico or Engineering.

22. In 1939 Liquid, Pure and Wyandotte sold their stock interest in Adico and International to Engineering, at less than one-seventeenth the original cost of such stock interest to Liquid, Pure and Wyandotte, and thereafter all the patents, rights and applications relating to apparatus, methods, processes and uses of dry ice owned or controlled by Adico and International were transferred to Engineer-[fol. 91] ing. Liquid, Pure and Wyandotte, however, continued as licensees and continued to pay the same royalties to Engineering as had been paid to International, and Engineering continued to maintain and extend the same monopoly of patents and patent control over the dry ice industry as had been established and maintained by International.

23. Engineering has, since 1939, acquired further patents, licenses, rights and applications relating to apparatus, methods, processes and uses of dry ice, and has utilized all its patents, licenses, rights and applications for the following specific purposes, among others:

(a) To discourage and prevent the manufacture of dry ice by manufacturers and prospective manufac-

turers of dry ice, other than licensees, by threatening to conduct and by conducting patent litigation against them;

(b) To require licensees under patents owned or controlled by Engineering to pay royalties on dry ice manufactured by or for such licensees whether or not such dry ice had been manufactured in accordance with the methods, processes and apparatus of any one of the licensed patents;

(c) To require licensees under patents owned or controlled by Engineering to assist in the maintenance of, and to agree never to dispute or contest, directly or indirectly, nor to assist any other person to dispute or contest, the validity or scope of present or future patents owned by or controlled by Engineering;

(d) To require licensees promptly to communicate and fully disclose to Engineering any and all inventions or improvements discovered, developed, acquired or controlled by the licensees in processes, methods or apparatus for the manufacture of dry ice constituting improvements upon the licensed patents; and upon request, to transfer, to Engineering all rights, title and interest thereto and to any patent or patent application thereon, with the right of Engineering to obtain patents thereon with the cooperation of the licensees; [fol. 92] (e) To discourage and prevent the manufacture of machinery for the manufacture of dry ice by the threat of oppressive patent litigation against manufacturers or prospective manufacturers of such machinery;

(f) To discourage and prevent manufacturers of dry ice machinery from manufacturing and selling such machinery to non-licensees thereby discouraging and preventing the manufacture of dry ice by such non-licensees.

24. Engineering has also extended its patent control over the manufacture of dry ice by securing from the York Corporation, hereinafter called York, one of the largest manufacturers of ice making machinery, an agreement to extend the benefits of patents owned by York in the dry ice field to licensees of Engineering, and by securing from the

said York an agreement to refuse to manufacture and sell dry ice machinery under patents owned by York to others than such licensees.

25. In addition to the acts, acquisitions, contracts, agreements and understandings hereinbefore alleged, the defendants:

(a) Agreed to and did fix, establish and maintain uniform and noncompetitive prices, terms and conditions for the sale of CO_2 and dry ice;

(b) Agreed to and did allocate business and territories among themselves;

(c) Agreed to and did disassemble and close acquired plants of competing manufacturers and distributors of CO_2 and dry ice;

(d) Agreed to and did create "price wars," that is, sell at unreasonably low prices to force competing concerns either to cease business or sell their plants and property to them. The objective achieved, the defendants would thereafter resume the fixed and established noncompetitive prices;

(e) Agreed to and did jointly or individually acquire the entire output of by-product CO_2 of the leading producers thereof, including, among others:

E. I. du Pont de Nemours & Company, of Delaware,
Carbide and Carbon Chemicals Corporation, of New York,
U. S. Industrial Alcohol Co., of New York,
[fol. 93] American Distilling Company, of California,
American Commercial Alcohol Corporation, of Delaware,
U. S. Industrial Chemicals, Inc., of Anaheim, California, Newark, New Jersey, New Orleans, Louisiana, Baltimore, Maryland,
Pennsylvania Alcohol Corporation, of Pennsylvania,
Commercial Solvents Corporation, of Maryland,
Delancey Chemical Corporation, of Pennsylvania,
Union Oil Company, of California,
Hiram Walker & Sons, Inc., of Illinois,
Hamm Brewing Company, of Minnesota,

American Solvents & Chemical Corporation, of California,

Pacific Silicate Company, Ltd., of California,

to eliminate and discourage competition and potential competition of such producers in the CO_2 or dry ice fields; and also to prevent others who might propose to enter the CO_2 and dry ice fields from procuring an adequate source of supply of CO_2;

(f) Agreed to an- did sell CO_2 and dry ice to one another so that they could serve their respective customers rather than compete for them;

(g) Agreed to and did refuse to sell dry ice for use in converters or liquefiers, (unfired pressure vessels in which dry ice is converted into carbon dioxide gas) or charge discriminatory prices for dry ice to discourage the use of converters or liquefiers.

VI

Effects of the Conspiracy

26. The aforesaid unlawful combination and conspiracy has had, and was intended by the defendants to have, the following effects:

(a) Interstate trade and commerce in the manufacture and sale of CO_2 and dry ice has been substantially and unreasonably restrained;

(b) The defendants have possessed and exercised the power to fix and maintain prices at arbitrary, unreasonable and noncompetitive levels;

(c) The defendants have monopolized and now hold a monopoly of the manufacture, sale and distribution of CO_2 and dry ice in the United States;

(d) The defendants dominate and control the manufacture sale, and distribution of CO_2 and dry ice in the United States;

(e) The defendants have arbitrarily divided cus- [fol. 94] tomers, business and territories in the manufacture, sale and distribution of CO_2 and dry ice and have allocated such customers, business and territories among themselves.

27. Since new enterprises desiring to engage in the manufacture, sale or distribution of CO_2 or dry ice would be subject to the great hazards necessarily involved in venturing into a field of industrial and commercial activity so completely dominated and controlled by the defendants, the aforesaid monopolization by and the monopoly and dominant position acquired by the defendants has had and will continue to have the effect of excluding others from engaging in competition with the defendants in the manufacture, sale and distribution in the United States of CO_2 and dry ice.

Prayer

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that the defendants have combined and conspired and are now engaged in a combination and conspiracy to restrain trade and commerce in CO_2 and dry ice among the several states of the United States in violation of Section 1 of the Sherman Act.

2. That the Court adjudge and decree that the defendants have combined and conspired and are now engaged in a combination and conspiracy to monopolize trade and commerce in CO_2 and dry ice among the several states of the United States in violation of Section 2 of the Sherman Act.

3. That the defendants, and each of them, and their officers, directors, agents, representatives, and employees, and all persons and corporations acting or claiming to act under the direction or on behalf of any of them, be permanently and perpetually enjoined and restrained:

(a) From continuing the combination and conspiracy to restrain and monopolize interstate trade and commerce in CO_2 and dry ice as hereinbefore complained of;

[fol. 95] (b) From engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the violations of the Sherman Act hereinbefore in this complaint set forth and described, or any violations of the Sherman Act similar thereto;

(c) From continuing, creating or giving effect to any agreement between or among any of the defendants as to allocations of business, customers, territories, prices, price lists, discounts, or any other terms and conditions of sale for the sale or distribution of CO_2 or dry ice;

(d) From conferring or consulting as to or discussing allocations of business, customers, territories, prices, price lists, discounts, or any other terms and conditions of sale for the sale or distribution of CO_2 or dry ice, at any meeting of any representatives, of any two or more of the defendants, or by any correspondence or communications between or among any two or more defendants, and from exchanging between or among any of the defendants any information as to allocations of business, customers, territories, prices, price lists, discounts, or any other terms and conditions of sale for the sale or distribution of CO_2 or dry ice;

(e) From refusing to sell dry ice for use in converters or liquefiers and from charging discriminatory prices for dry ice for use in converters or liquefiers.

5. That the Court adjudge and decree that the defendants have used patents unlawfully as a means of carrying out the aforesaid combination and conspiracy, and that each of the defendants:

(a) Be enjoined from instituting and prosecuting [fol. 96] any suit for infringement under any patents utilized by any of them in effectuating the combination and conspiracy hereinabove alleged;

(b) Be directed to grant to any applicant making request therefore an unrestricted and royalty free license under any or all patents used in carrying out or maintaining said violations of law.

6. That under such terms and conditions and according to such plan or program as may be approved by and subject to the supervision of this Court, the defendants be required:

(a) To make such divestiture of their businesses, plants, facilities and properties necessary to dissipate

the effects of the unlawful activities herein alleged and to establish free and unfettered competition in the trade and commerce herein described; and

(b) To cancel and terminate such contracts, agreements and arrangements to acquire the entire output of CO_2 and by-product CO_2 of producers thereof, and discontinue the practice of entering into such contracts, agreements and arrangements, as the Court may deem appropriate and necessary to effectuate the dissolution of the combination and conspiracy hereinabove alleged.

7. That the plaintiff have such other, further, and different relief as the nature of the case may require and the Court may deem just and proper.

8. That the plaintiff recover the costs of this suit.

9. That pursuant to Section 5 of the Sherman Act, an order be made and entered requiring such other defendants as are not within this District to be brought before this [fol. 97] Court in this proceeding as parties defendant, and directing the Marshals of the Districts in which they severally reside to serve summons upon them.

Dated June 24, 1948.

Robert A. Nitschke, Manuel M. Gorman, Samuel Flatow, Special Assistants to the Attorney General, Daniel A. Schiffer, Special Attorney.

Tom C. Clark, Attorney General of the United States, Herbert A. Bergson, Assistant Attorney General, J. Vincent Keogh, United States Attorney, J. Francis Hayden, Special Assistant to the Attorney General.

[fol. 97a] [File endorsement omitted.]

[fol. 98] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT THE LIQUID CARBONIC CORPORATION —Filed October 15, 1948.

Defendant The Liquid Carbonic Corporation, by its attorneys, Satterlee, Warfield & Stephens, answering the complaint herein:

1. Denies each and all of the averments of paragraph 1 of said complaint, except that this defendant admits that said complaint purports to have been filed and these proceedings purport to have been instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act."

2. States that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 11 of said complaint, except that this defendant admits that:

[fol. 99] (a) Demand for both CO_2 and dry ice is and has been increased since September 1, 1939;

(b) Pure and Liquid are the only companies in the United States having nationwide distribution of both Co_2 and dry ice;

(c) Pure and Liquid own and operate plants for the manufacture of CO_2 and dry ice in a number of states of the United States; and

(d) In the regular course of business Pure and Liquid sell and ship substantial quantities of CO_2 and dry ice and Wyandotte sells and ships substantial quantities of dry ice into states other than the states of manufacture.

3. Denies each and all of the averments of paragraph 12 of said complaint, except that this defendant admits that:

(a) Pursuant to an agreement dated as of November 22, 1928, Liquid acquired on or about January 31, 1929, the assets, plants and properties of General Carbonic Company, a New York corporation.

(b) Pursuant to agreements dated December 5, 1928,

Liquid acquired as of December 6, 1928, certain assets of The Clarke Chemical Company, an Ohio corporation.

(c) Pursuant to an agreement dated February 20, 1930, Liquid acquired on or about March 13, 1930, the assets, plants and properties of Keystone Carbonic Gas Company, a Pennsylvania corporation.

[fol. 100] (d) Pursuant to an agreement dated December 12, 1930, the Liquid Carbonic Pacific Corporation, Ltd. (hereinafter referred to as "Liquid Pacific"), a California corporation which was a wholly-owned subsidiary of Liquid, acquired as of November 30, 1930 certain assets and a plant and property of The Western Carbonic Gas Company, a California corporation.

(e) Pursuant to an agreement dated July 1, 1931, Liquid, among other things, acquired on or about July 13, 1931, the plant, machinery, equipment and property of Dry Ice Corporation of America (a Delaware corporation) located in Los Angeles, California, and certain machinery and equipment owned by Dry Ice Corporation of America relating to the manufacture and storage of dry ice, located in or immediately adjacent to plants owned by Liquid in the following cities:

Albany, N. Y.	Kansas City, Mo.
Atlanta Ga.	Long Island City, N. Y.
Cambridge, Mass.	Maspeth, N. Y.
Chicago, Ill.	Minneapolis, Minn.
Cincinnati, Ohio	New Orleans, La.
Cleveland, Ohio	Philadelphia, Pa.
Denver, Colo.	Seattle, Wash.
Jacksonville, Fla.	St. Louis, Mo.

4. States that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 13 of said complaint, except that this defendant admits, on information and belief, that:

(a) Assets of Carbonic Gas, Incorporated, Cincinnati, Ohio, and of Carbonic Gas, Incorporated, Detroit,

Michigan, were acquired by Pure on or about November 1, 1929.

(b) Assets of Natural Carbonic Gas Company, New York, and of Natural Carbonic Ice Company, New [fol. 101] Jersey, were acquired by Pure on or about March 26, 1930.

5. Denies each and all of the averments of paragraph 14 of said complaint, except that this defendant admits that:

(a) In 1929 Air Reduction and Liquid jointly caused to be organized under the laws of the Republic of Cuba a corporation named Compania de Carbonico Liquido de Cuba, S. A.

(b) Since 1929 Air Reduction and Liquid have each owned one-half of the outstanding capital stock and have each elected one-half of the total number of directors of said Cuban company.

(c) In May, 1940, said Cuban company purchased from the defendant Engineering all Cuban letters patent and patent rights owned or controlled by Engineering relating to apparatus, methods and processes for the production and use of dry ice.

6. Denies each and all of the averments of the paragraphs of said complaint numbered 15, 25, 26 and 27.

7. Denies each and all of the averments of paragraph 16 of said complaint, except that this defendant admits:

(a) On information and belief, that, pursuant to an agreement dated April 7, 1933, Pure purchased from Delancey Chemical Corporation certain trucks, cylinders and other property used by Delancey Chemical Corporation in the sale and distribution of CO_2 and dry ice.

(b) That on April 27, 1933, by agreement, understanding and arrangement among Pure, Liquid, Wyandotte (or its New York representative) and American Dry Ice Corporation, Pure sold to Liquid, [fol. 102] Wyandotte (or its New York representative) and American Dry Ice Corporation part of the trucks, cylinders and other property which Pure had pur-

chased, as aforesaid, from Delancey Chemical Corporation.

(c) On information and belief, that the aforementioned agreement dated April 7, 1933, Pure also contracted, among other things, to purchase for a period of up to five years substantially the entire annual production of CO_2 and dry ice of Delancey Chemical Corporation.

8. Denies each and all of the averments of paragraph 17 of said complaint, except that this defendant admits that:

(a) Pursuant to agreement dated July 15, 1932, Liquid acquired certain assets and plants of the Bishop & Babcock Manufacturing Company and The Bishop & Babcock Sales Co., Ohio corporations.

(b) Pursuant to agreement dated November 8, 1934, Liquid acquired on or about December 1, 1934 certain assets and a plant of Zero Ice Corporation, a Michigan corporation.

(c) Pursuant to agreement dated April 11, 1935, Liquid acquired certain assets of S. G. Parker Company, a Massachusetts corporation.

(d) Pursuant to agreement dated May 8, 1937, Liquid acquired on or about March 30, 1937, the assets, plant and property of the Saxet Carbonic Company, a Texas corporation.

(e) Pursuant to agreement dated March 20, 1937, Liquid acquired the assets and plant of National Carbonic Company, a Texas corporation.

[fol. 103] (f) Pursuant to agreement dated July 20, 1937, Liquid Pacific acquired certain assets and the plant and property of Washington Liquid Gas Company, Inc., a Montana corporation.

(g) Pursuant to agreement dated December 9, 1937, Liquid acquired certain assets and the plant of J. E. Crosbie, Inc., an Oklahoma corporation.

(h) During August, 1936, Liquid purchased certain assets, including cylinders, from Western Carbonic Company of Omaha, Nebraska and from Western Carbonic & Chemical Co. at Kansas City, Missouri.

(i) Pursuant to lease dated May 26, 1939, Liquid acquired in December of that year 3,000 cylinders from National Cylinder Gas Company, a Delaware corporation.

(j) Pursuant to agreement dated December 28, 1938, Liquid Pacific acquired certain assets, including cylinders from Pacific Silicate Co., Ltd., a California corporation.

(k) Pursuant to an option agreement dated May 29, 1931, Liquid acquired on December 27, 1934, the entire capital stock of Carbonic Gas & Service Corporation, a New York corporation and a distributor of CO_2 in the New York area.

(l) After 1932 Liquid contracted to acquire the entire production of CO_2 and dry ice of certain other companies, but this defendant alleges that it no longer has any such contracts, except two agreements for the purchase of raw carbonic gas which Liquid manufactures in its own plants into commercially salable CO_2 and dry ice.

[fol. 104] 9. States that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 18 of said complaint, except that this defendant admits, on information and belief, that:

(a) Assets of Nu-Ice Company, Nevada, were acquired by Dry Ice, Inc., on March 30, 1937, and certain of such assets were thereupon transferred by said Dry Ice, Inc., to Pure. On or about October 1, 1937, Dry Ice, Inc., was dissolved and its then assets were thereupon acquired by Pure.

(b) Assets of Crystal Carbonic Laboratory, Georgia, and of Crystal Carbonic Laboratory, Inc., Delaware, were acquired by Air Reduction on or about September 30, 1937, and then or thereafter such assets were transferred to Pure.

(c) Assets, including a plant, of Alabama Carbon Dioxide Ice, Inc., Alabama, were acquired by Pure on or about May 24, 1938.

(d) Assets of New York Carbonic Company (Her-

man Hegt, Proprietor), New York, were acquired by Pure on or about June 6, 1940.

(e) Assets of Solid Carbonic Corporation, Iowa, were acquired by Pure on or about July 19, 1941.

(f) Certain assets of Carbo-Frost, Inc., New York, were acquired by Pure during 1932.

(g) Certain assets of Chemical Gases, Inc., New York, were acquired by Air Reduction on or about August 6, 1936.

[fol. 105] (h) Certain California assets of American Distilling Company were acquired by Pure in August, 1936.

(i) Assets of Braustein Brothers Carbonic Sales Corporation, New York, were acquired by Pure on or about July 30, 1940.

(j) Since 1932 Pure has from time to time contracted to acquire the CO_2 and dry ice production of other companies.

10. States that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 19 of said complaint, except that this defendant admits:

(a) On information and belief, that on or about April 6, 1934, Dry Ice, Inc., a wholly-owned subsidiary of Pure, acquired the assets of American Dry Ice Corporation, including all of the capital stock of Adico Development Corporation (referred to as "Adico"), a corporation holding patents relating to the manufacture and use of dry ice.

(b) That later in April, 1934, Pure sold one-third of the capital stock of Adico to Liquid and sold another one-third of the capital stock of Adico to Wyandotte.

11. Denies each and all of the averments of paragraph 20 of said complaint, except that this defendant admits that:

(a) In April, 1934, Engineering and Adico each held important patents in the dry ice field.

(b) On June 12, 1934, a new corporation, Interna-

tional Carbonic, Incorporated (called "International") was organized.

[fol. 106] (c) Three-fifths of the authorized capital stock on International were duly issued to Adico and the other two-fifths of such stock were duly issued to Engineering.

(d) At the time of the issuance of such stock, and as part of the consideration therefor, Adico and Engineering granted to International exclusive licenses to all U. S. dry ice patents, patent rights and patent applications owned or controlled by each of them, with the right in International to grant sub-licenses under any and all of said patents, patent rights and patent applications.

(e) International granted such sub-licenses to Liquid, Pure and Wyandotte.

12. States that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 21 of said complaint, except that this defendant admits that from July, 1934, to January, 1939, International issued no sub-licenses for the manufacture or sale of dry ice to any concern other than concerns that had been previously licensed by Adico and Engineering.

13. Denies each and all of the averments of paragraph 22 of said complaint, except that this defendant admits that:

(a) Pursuant to the terms of a contract made in January, 1939, Liquid, Pure and Wyandotte sold their stock interests in Adico and International to Engineering.

(b) As of May 1, 1939, International was merged into Adico, the latter thereupon assuming Interna-[fol. 107] tional's name.

(c) On September 30, 1944, International (formerly Adico) was dissolved and all of its assets were thereupon transferred to Engineering, which assumed all of the obligations, liabilities and commitments of the dissolved company.

(d) After September 30, 1944, Liquid, Pure and

Wyandotte continued as patent licensees and continued to pay royalities to Engineering.

14. Denies, on information and belief, each and all of the averments of the paragraphs of said complaint numbered 23 and 24.

For a Partial Defense, this Defendant Alleges:

15. On or about June 25, 1940, the Federal Trade Commission (hereinafter generally referred to as "FTC"), an agency of the plaintiff herein, addressed a questionnaire, entitled "Memorandum of Investigation, File No. 1-7421," to members of the American carbon dioxide industry, including this defendant and the defendants Air Reduction, Pure and Wyandotte. Said questionnaire requested said companies to supply extensive information concerning, among other things: corporate set-ups, officers, directors, stockholders and subsidiaries; acquisitions of other companies; production, purchases and sales of CO_2 and dry ice; prices and customers for such products; policies as regard sales of dry ice to users of converters, and dry ice patent license agreements. The companies to which said questionnaire was addressed, including this defendant, fully and truthfully answered the same.

16. Thereafter, on or about October 28, 1940, the plaintiff herein, by the Attorney General of the United States and his assistants in the Department of Justice and the [fol. 108] United States Attorney for the Southern District of New York, instituted a Grand Jury investigatory proceeding against various American companies engaged in the carbon dioxide business, including this defendant and the defendants Air Reduction, Pure and Wyandotte. Subpoenas duces tecum were issued and served in said proceeding, requiring, in effect, that each of said companies produce all of its books, records, files and other documents from January 1, 1928, to October 28, 1940, relating to the carbon dioxide industry in general, and in particular to such company's own CO_2 and dry ice properties, contracts, agreements, understandings, patent rights, policies, practices, production, distribution, prices, purchases and sales. The return dates of said subpoenas duces tecum were

thereafter extended from time to time over a period of approximately two years, during which said investigation was carried on.

17. Said companies, now defendants herein, including this defendant, at all times cooperated to the fullest extent with the Department of Justice in its conduct of said investigation. In compliance with said subpoenas duces tecum and with numerous supplemental requests made by representatives of the Department of Justice, said companies supplied said representatives with a huge mass of documentary material (including the answers to the FTC questionnaire referred to in paragraph 15 hereof); prepared and submitted to said representatives various compilations, schedules and other data; permitted said representatives to inspect books, records and files located at offices of said companies in various cities throughout the country, and otherwise answered all questions and complied with all requests of said representatives. At the conclusion of said investigation in or about November, 1942, the Department of Justice had been furnished with [fol. 109] and possessed full and complete knowledge and information concerning the carbon dioxide industry generally, and in particular concerning the positions, acts and practices of this defendant and of defendants Air Reduction, Pure and Wyandotte in said industry.

18. Upon the completion of said investigation in or about November, 1942, as aforesaid, the Department of Justice proceeded no further. No action of any kind was brought at that time against any of the defendants herein for alleged violations of the anti-trust laws or any other laws of the United States. Upon information and belief, the Department of Justice thereupon or thereafter turned over most, if not all, of the material and data collected by it in the course of its said investigation to FTC.

19. On March 29, 1944, FTC instituted a proceeding (FTC Docket No. 5143), pursuant to Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U.S. Code §45) and Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U.S. Code §13), against this defendant, the defendants Air Reduction, Pure and Wyandotte, and another member of the carbon

dioxide industry, Mathieson Alkali Works, Inc. The complaint of the FTC (as subsequently amended) in said proceeding covered all of the acts and practices complained of as against this defendant and defendants Air Reduction, Pure and Wyandotte in part V ("Offenses Charged") of the Complaint in the action at bar. Said FTC proceeding was prosecuted to a conclusion over a period of more than four years.

[fol. 110] 20. The acts and practices of this defendant and of defendants Air Reduction, Pure and Wyandotte which are complained of in said part V of the Complaint herein were disclosed in the answers to the FTC questionnaires referred to above in paragraph 15 hereof, and were further disclosed in greater detail in the course of the Department of Justice investigation referred to above in paragraphs 16 and 17 hereof, and were the subject of protracted hearings and conferences and of lengthy stipulations as to the facts in the FTC proceeding referred to above in paragraph 19 hereof.

21. The said FTC proceedings commenced on March 29, 1944, as aforesaid, finally resulted on June 17, 1948, in the entry of a Cease and Desist Order (hereinafter generally referred to as the "FTC Order"), a true copy of which is hereto annexed, marked "Exhibit A," and by this reference made a part hereof.

22. Each of the companies, including this defendant, to which the FTC Order (Exhibit A hereto) was directed has acquiesced therein and has duly filed with FTC a compliance report showing that there has been complete cessation and desistance from each and all of the acts and practices prohibited in Sections I and II of said Order. This defendant and, on information and belief, the defendants Air Reduction, Pure and Wyandotte, have in fact ceased and desisted from each and all of the acts and practices so prohibited and have been and are in fact complying with the FTC Order in all respects.

23. The time prescribed by law for filing a petition to obtain judicial review of the FTC Order (Exhibit A hereto) has expired, and said Order has become final and is subject to enforcement according to law.

[fol. 111] 24. Prior to the commencement of this action,

this defendant and defendants Air Reduction, Pure and Wyandotte had by the FTC Order (Exhibit A hereto) already been enjoined and prohibited, at the behest of the plaintiff herein, from doing, continuing, resuming or repeating any of the acts or practices complained of in said part V of the complaint herein. There was and is, accordingly, no need or necessity for the granting of any further injunctive or prohibitory relief against said defendants with respect to any of such acts and practices.

WHEREFORE, this defendant, The Liquid Carbonic Corporation, demands judgment in its favor, dismissing the Complaint of the plaintiff herein.

Dated: October 15, 1948.

Satterlee, Warfield & Stephens, By Lloyd F. Thanhauser, Of Counsel. Attorneys for the defendant, The Liquid Carbonic Corporation, 49 Wall Street, New York 5, N. Y.

[fol. 112] EXHIBIT A TO ANSWER

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 17th day of June, A.D., 1948.

Commissioners: Robert E. Freer, Chairman, Garland S. Ferguson, Erwin L. Davis, William A. Ayres, Lowell B. Mason.

Docket No. 5143

In the Matter of: PURE CARBONIC, INC., a Corporation; AIR REDUCTION COMPANY, INC., a Corporation; LIQUID CARBONIC CORPORATION, a Corporation; and MICHIGAN ALKALI COMPANY, a Corporation.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the

answers thereto, stipulations of facts, and recommended decision of the trial examiner (no briefs having been filed and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that respondents have violated the provisions of the Federal Trade Commission Act:

I. It Is Ordered that Pure Carbonic, Inc., a corporation; Air Reduction Company, Inc, a corporation; The Liquid Carbonic Corporation, a corporation; and Michigan Alkali Company, a corporation (now Wyandotte Chemicals Corporation), their respective officers, representatives, agents, and employees, in connection with the purchasing, offering for sale, sale, and distribution of solid or liquid carbon dioxide in commerce as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents or between one or more of said respondents and others not parties hereto to do or perform, either directly or indirectly, any of the following acts or practices:

1. Purchasing the productive or distributive facilities or other assets of competitors, or control thereof. [fol. 113] 2. Entering into or carrying out purchase agreements with manufacturers of solid and/or liquid carbon dioxide whereby any one or more of said respondents agrees to purchase the entire output of any of said manufacturers or a substantial portion thereof.

3. Contracting to purchase or purchasing liquid and/or solid carbon dioxide from competing producers upon condition that said producers will not sell to competitors of any of said respondents solid carbon dioxide or liquid carbon dioxide for the purpose of manufacturing solid carbon dioxide therefrom.

4. Establishing, fixing, or maintaining prices, terms, conditions of sale, or charges for services in connection with the sale of solid or liquid carbon dioxide, or adhering to any prices, terms, conditions of sale, or service charges so fixed or maintained.

5. Preventing the sale of, or refusing to sell, solid carbon dioxide to owners or lessees of converters or liquefiers for conversion into liquid carbon dioxide.

6. Offering to sell or selling solid carbon dioxide to owners or lessees of converters or liquefiers at prices in excess of those offered or charged purchasers of comparable quantities for other uses.

7. Allocating, reserving, or limiting certain territorial areas to the exclusive use of any one or more of them in the sale and distribution of solid or liquid carbon dioxide.

8. Owning or controlling stock or other share capital of any corporation which owns or controls patent rights or patent applications relating to the manufacture of solid carbon dioxide, or in any other manner controlling such patents, patent rights, or patent applications whereby competing manufacturers or prospective manufacturers of solid carbon dioxide are hindered or prevented from continuing in or entering into the manufacture of said product.

II. It Is Further Ordered that the respondents Pure Carbonic, Inc., Air Reduction Company, Inc., and The Liquid Carbonic Corporation, pursuant to a planned common course of action, understanding, agreement, combination, or conspiracy between and among them, or between one or more of them and others, cease and desist from:

Cutting prices of solid or liquid carbon dioxide to customers of competitors in certain areas below the prices charged the same class of customers in comparable areas.

III. It Is Further Ordered, for the reasons appearing in the findings as to the facts and conclusion in this proceeding, that the charges in Count II of the complaint herein be and the same are hereby withdrawn without prejudice to the right of the Commission to institute a further proceeding against each of these respondents at any time with respect to alleged violations of the Robinson-Patman Act.

[fol. 114] IV. It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of

this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with it.

By the Commission. Otis B. Johnson, Secretary.

[fol. 115] IN UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 9179

UNITED STATES OF AMERICA, Plaintiff,

v.

THE LIQUID CARBONIC CORPORATION, AIR REDUCTION COMPANY, Incorporated, Pure Carbonic, Incorporated, Wyandotte Chemicals Corporation, and International Carbonic Engineering Company, Defendants

FINAL JUDGMENT—Filed March 7, 1952

Plaintiff, United States of America, having filed its complaint herein on June 24, 1948, and the defendants herein having appeared and filed their answers to the complaint, denying the sustantive allegations thereof, and the plaintiff and defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein,

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a cause of action against the defendants under Sections 1 and 2 [fol. 116] of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlaw-

ful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Liquid" means defendant The Liquid Carbonic Corporation, a corporation organized and existing under the laws of the State of Delaware;

(B) "Airco" means defendant Air Reduction Company, Incorporated, a corporation organized and existing under the laws of the State of New York, and defendant Pure Carbonic, Incorporated, a corporation organized and formerly existing under the laws of the State of Delaware, said defendant Pure Carbonic, Incorporated, a wholly owned subsidiary of Air Reduction Company, Incorporated, having, since the filing of the complaint herein, been merged into Air Reduction Company, Incorporated, the business formerly carried on by such defendant now being carried on as a division of Air Reduction Company, Incorporated;

(C) "Wyandotte" means defendant Wyandotte Chemicals Corporation, a corporation organized and existing under the laws of the State of Michigan;

(D) "Engineering" means defendant International Carbonic Engineering Company, a corporation organized and existing under the laws of the State of Delaware;

(E) "CO_2" means carbon dioxide in the form of gas, liquid or both;

(F) "dry ice" means solid carbon dioxide;

(G) "person" means any individual, firm, partnership, corporation, association, trustee or any other business or legal entity;

[fol. 117] (H) "patents" means United States Letters Patent and applications therefor in so far as they relate to the maufacture or use of CO_2 or dry ice or both, and any method, material, equipment or process involved in such manufacture or use, including all reissues, divisions, continuations or extensions thereof;

(I) "emergency purchases" shall mean temporary purchases of CO_2 or dry ice, during a period not to exceed

90 consecutive days at any one time, and only in the amount necessary (a) to replace production lost by a defendant in one of its plants for reasons beyond its reasonable control or (b) to replace quantities not obtained by reason of the complete or substantially complete failure of one of its normal sources of supply.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors and assigns and to each of their officers, directors, agents, employees and to all other persons acting under, through or for such defendant, but shall not apply to transactions solely between a defendant and a subsidiary or subsidiaries thereof. Each defendant is hereby ordered and directed to take such steps as are necessary to secure compliance by its officials, subsidiaries and such other persons, described above, with the terms of this Final Judgment.

IV

Defendants are jointly and severally enjoined and restrained from:

(A) Entering into, adhering to or claiming any rights under any combination, conspiracy, contract, agreement, understanding, plan or program which has the purpose or effect of:

[fol. 118] (1) allocating or dividing customers, territories, markets or fields for the manufacture, sale or distribution of CO_2 or dry ice;

(2) determining, fixing, maintaining or adhering to prices, price lists, differentials, discounts or other terms or conditions for the sale or distribution of CO_2 or dry ice to third persons;

(B) Discussing, corresponding or otherwise exchanging any information with any person engaged in the manufacture, sale or distribution of CO_2 or dry ice as to the activities enjoined by subsection (A) of this Section IV;

(C) Restricting or attempting to restrict, in any manner, the use made of CO_2 or dry ice sold by any defendant or by any other person;

(D) Discriminating, in any manner, against any person purchasing dry ice for the purpose of converting it into CO_2;

(E) Requiring any jobber, distributor or other purchaser of CO_2 or dry ice to (1) furnish the name or address of any customer, (2) permit inspection of its records or books or (3) otherwise divulge any information as to the business practices or policies of any such jobber, distributor or purchaser, except that a defendant may require the maintenance of particular records showing the location of CO_2 cylinders owned by such defendant, which records may be examined by the defendant for the sole purpose of locating cylinders which have not been returned within a reasonable time;

(F) Without adjudicating, determining or affecting the legality or illegality of any existing practices of any defendant, selling, leasing installing or otherwise making available to any purchaser of CO_2 or dry ice any storage tanks, converters or other equipment on or accompanied by any condition, agreement or understanding that such purchaser [fol. 119] shall not purchase CO_2 or dry ice manufactured or sold by anyone other than the defendant;

(G) Causing, authorizing or knowingly permitting any officer, director or employee of a defendant to serve as an officer, director or employee of (1) any other defendant, or (2) except as to officers, directors or employees of defendant Engineering, any other person engaged in the manufacture, sale or distribution of CO_2 or dry ice for the trade in the United States, its territories and possessions.

V

Defendants Liquid, Airco and Wyandotte are jointly and severally enjoined and restrained from:

(A) Voting or acquiring, directly or indirectly, legal title to or any beneficial interest in (1) any shares of the capital stock of, or (2) any bonds, debentures or other evidence of indebtedness issued by (a) defendant Engineering, (b) any person who may acquire any or all of the assets or capital stock of defendant Engineering or (c), except as permitted by subsection (D) of this Sec-

tion V, any other person engaged in the manufacture, distribution or sale of CO_2 or dry ice in which any other defendant now has or may hereafter acquire a financial interest of any kind;

(B) Acquiring, directly or indirectly, legal title to or any beneficial interest in any patent owned or controlled by (1) defendant Engineering, (2) any person who may acquire any or all of the assets or capital stock of defendant Engineering or (3) any other person engaged in the manufacture, distribution or sale of CO_2 or dry ice in which any other defendant now has or may hereafter acquire a financial interest of any kind;

(C) Dominating, controlling or interfering with, or attempting to dominate, control or interfere with, the business, financial or promotional policies, practices, operation, management, expansion or other business policy or [fol. 120] act of defendant Engineering or any other person engaged in the manufacture, distribution or sale of CO_2 or dry ice in the United States, its territories and possessions;

(D) After 90 days following entry of this Final Judgment, having any representative on the Board of Directors of, or voting any of the capital stock issued by, Liquid Carbonic Corporation of Cuba if any other defendant has any representative on such Board or is entitled to vote any such stock of said Liquid Carbonic Corporation of Cuba.

VI

Defendants Airco and Liquid are severally enjoined and restrained from:

(A) Selling CO_2 or dry ice to each other unless it has CO_2 or dry ice available in excess of the current demands on such defendant therefor and then only to the extent of temporary purchases during a period not to exceed 90 consecutive days at any one time and

(1) during the months of June, July, August and September only in the amount necessary to replace production lost (a) in one of its plants because of fire, flood or other major disaster of similar nature, or (b) in the plant of a supplier because of reasons beyond the reasonable control of the supplier; and

(2) during the rest of the year, only in the amount necessary (a) to replace production lost in one of its plants for reasons beyond its reasonable control or (b) to replace quantities not obtained by reason of the complete or substantially complete failure of production of one of its normal sources of supply;

(B) Selling, or causing to be sold, CO_2 at any industry level at such prices, terms or conditions as will tend to eliminate jobbers or distributors of CO_2 purchasing CO_2 from such defendant as competitors, provided that nothing contained herein shall be construed to obligate defendants [fol. 121] Airco or Liquid to sell CO_2 at a price below such defendant's cost of production and distribution of CO_2;

(C) Making emergency purchases for a period of 2 years from the date of entry of this Final Judgment, where it would be apparent to a reasonably prudent business man that the effect of such purchases would be to deprive jobbers or distributors of CO_2 or dry ice which they desire to obtain.

VII

(A) Each of the defendants Liquid and Airco, for a period of 10 years after entry of this Final Judgment, is

(1) ordered and directed, subject to subsection (A) of Section VI herein, to sell directly to any person who is engaged in, or who may desire to engage in, the sale and distribution of CO_2 (referred to in this Section VII as "Distributor" or "Distributors") meeting the minimum credit, quantity and business standards required by such defendant of any of its Distributors, and who offers to purchase same, CO_2 manufactured or purchased by such defendant for resale and which at the time of receipt of request to purchase such defendant has not already sold or contracted to sell in a bona fide transaction or allocated to meet specific requests from regular customers, or current requests of such customers which its past experience has shown it may justifiably anticipate, on prices, terms or conditions of sale regularly offered to similarly situated Distributors meeting such standards. In addition, in

times of industry shortage, where a defendant is engaged in selling CO_2 in competition with any Distributor or Distributors of such defendant, such defendant shall share, with such Distributor or Distributors, on a non-discriminatory basis and upon prices, terms and conditions of sale that are not less favorable than those extended to similarly situated Distributors not in competition with such defendant, the supplies of CO_2 in the possession of or under the control [fol. 122] of such defendant;

(2) enjoined and restrained from selling or offering for sale CO_2 to any retail business establishment (*i. e.*, one customarily purchasing and using one cylinder at a time and doing business at a single location), in any area where the defendant is not regularly making such sales at the time of entry of this Final Judgment; *provided, however,* that any such defendant may make such sales in an area when a Distributor, through which it has sold, fails to adhere to such minimum credit, quantity and business standards or, without fault on the part of such defendant, ceases to act, or is disabled from acting, as a Distributor, but in any such event of failure, cessation or disability the defendant shall use its best efforts to sell through another Distributor or Distributors meeting such standards and, should the matter be brought to the attention of this Court by the plaintiff herein, the burden shall be upon the defendant to show to this Court that it has used such efforts.

(B) Defendant Wyandotte, for a period of 10 years after entry of this Final Judgment, is ordered and directed, subject to subsection (C) of Section IX herein, to sell directly to any person who is now engaged in, or who desires to engage in, the sale and distribution of CO_2 or dry ice, or both, meeting the minimum credit, quantity and business standards required by defendant Wyandotte of its distributors and jobbers, and who offers to purchase same, CO_2 or dry ice, or both, manufactured or purchased by defendant Wyandotte for resale and which at the time of receipt of request to purchase, Wyandotte has not al-

ready sold or contracted to sell in a bona fide transaction or allocated to meet specific requests from regular customers, or current requests of such customers which its past experience has shown it may justifiably anticipate, [fol. 123] on prices, terms or conditions of sale regularly offered to similarly situated distributors and jobbers meeting such standards.

(C) Defendant Wyandotte is ordered and directed on January 2, 1953, to cancel its license with defendant Engineering, dated July 1, 1934, as amended.

(D) Each of the defendants is enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement, understanding, plan or program which has the purpose or effect of:

(1) appointing, designating or employing any person as sole jobber or distributor of CO_2 or dry ice for such defendant in any territory, area or locality;

(2) restricting or preventing any jobber or distributor of CO_2 or dry ice from selling, buying or dealing in CO_2 or dry ice manufactured or sold by anyone other than such defendant.

(E) Each of the defendants is enjoined and restrained from instituting, maintaining or continuing any action or proceeding which has the purpose or effect of preventing any person from using the words "dry ice" in connection with the manufacture, distribution or sale of CO_2 and dry ice.

VIII

(A) Each defendant is perpetually enjoined and restrained from acquiring, directly or indirectly, with any other defendant or any other person engaged in the manufacture, distribution or sale of CO_2 or dry ice in the United States, its territories and possessions, by purchase, merger, consolidation or otherwise after the entry of this Final Judgment, and from holding or exercising after such acquisition, ownership or control of the business, physical assets or good will, or any part thereof, any shares of the capital stock or securities of, or any evidence of indebtedness issued by, any person engaged in the manufacture, distribution or sale of CO_2 or dry ice;

[fol. 124] (B) Defendants Liquid, Airco and Wyandotte, for a period of 10 years from the date of entry of this Final Judgment, and subject to Section IX herein, are each enjoined and restrained from acquiring, directly or indirectly, by purchase, merger, consolidation or otherwise, and from holding or exercising after such acquisition, ownership or control of the business, physical assets (except goods or products bought or incidental to the ordinary course of business) or good will, or any part thereof, or any capital stock or securities (excepting the purchase, solely for the purpose of investment, by officers, directors, agents and employees of said defendants, of any capital stock of any person which does not manufacture CO_2 for the trade) of, any person engaged in the manufacture, distribution or sale of CO_2 or dry ice in the United States, its territories or possessions, until after the defendant has, upon reasonable notice to the Attorney General with an opportunity on the part of the latter to be heard, demonstrated to the satisfaction of this Court that the effect of the proposed acquisition may not be to substantially lessen competition in the manufacture, sale or distribution of CO_2 or dry ice, or to tend to create a monopoly in the manufacture, sale or distribution of CO_2 or dry ice;

(C) Defendants Liquid and Airco are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any producer of CO_2 or dry ice whereby such producer agrees not to produce or sell more CO_2 or dry ice than is purchased by the defendant, or agrees otherwise to limit or restrict production or sale of CO_2 or dry ice.

IX

(A) Subject to the provisions of subsection (F) of this Section IX, defendant Airco is enjoined and restrained after April 30, 1953 from purchasing or acquiring, directly or indirectly, from Delancey Chemical Corporation, Philadelphia, Pennsylvania, any CO_2 or dry ice except on the following basis:

[fol. 125] (1) during each month of the period from April 30, 1953 through December 31, 1953 a volume by

weight not exceeding 80% of the total specified for the corresponding month in the 1950 purchase contract between Delancey and Airco;

(2) during each month of the period from January 1, 1954 through December 31, 1954 a volume by weight not exceeding 70% of the total specified for the corresponding month in the said purchase contract;

(3) during each month after December 31, 1954 a volume by weight not exceeding 50% of the total specified for the corresponding month in the said purchase contract;

(B) Defendant Airco is ordered and directed to cancel after one year from the date of entry of this Final Judgment any contract, understanding or arrangement for the purchase of CO_2 or dry ice from California Carbonic Company, Los Angeles, California, and Carbonic Chemical Company, Mosquero, New Mexico;

(C) Subject to the provisions of subsection (F) of this Section IX, each of the defendants Airco and Liquid is enjoined from purchasing or acquiring from defendant Wyandotte, and Wyandotte is enjoined from selling or transferring to Airco or Liquid, directly or indirectly, any CO_2 or dry ice after December 31, 1954, and between March 1, 1952 and December 31, 1954 except as follows:

(1) during each month of the period from March 1, 1952 through December 31, 1952 a volume by weight not exceeding 80% of the total each purchased from Wyandotte during the corresponding month of the year 1951;

(2) during each month of the period from January 1, 1953 through December 31, 1953 a volume by weight not exceeding 50% of the total each purchased from Wyandotte during the corresponding month of the year 1951;

[fol. 126] (3) during each month of the period from January 1, 1954 through December 31, 1954 a volume by weight not exceeding 33⅓% of the total each purchased from Wyandotte during the corresponding month of the year 1951;

(D) Defendant Liquid is ordered and directed to cancel at the end of one year from the date of entry of this Final

Judgment any contract, understanding or arrangement for the purchase of CO_2 or dry ice from Ideal Dry Ice Manufacturing Company, Ada, Oklahoma and Carbon Dioxide & Chemical Company, Price, Utah;

(E) (1) Within one year from the date of entry of this Final Judgment, defendant Liquid shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana, hereinafter referred to singularly and collectively as "said plants." Reference to said plants in this Final Judgment shall include all real estate, buildings and improvements thereon; all machinery and other production equipment appurtenant thereto; all production sales and engineering records relevant to the operation of said plants; and all other facilities and equipment used in the manufacture of CO_2 or dry ice.

(2) The disposal of said plants shall be effected through a trustee or trustees (hereinafter referred to as "The Trustee") appointed by the Court forthwith after entry of this Final Judgment. The term of appointment of The Trustee shall be one year. The Court may extend such term upon a showing that there may be persons who have an interest in purchasing the said plants. The Trustee is to act as an officer of the Court and shall have full powers to bring about the prompt and expeditious disposal of said plants in accordance with the terms and conditions of this subsection (E) of this Section IX of this Final Judgment. The compensation of The Trustee shall be fixed by the Court.

[fol. 127] (3) Disposal of said plants shall be at such reasonable prices as shall be determined by the Court, having due regard to a value determination made by an independent appraiser appointed by the Court. In the event that any offer for the purchase of said plants for CO_2 purposes is received which is less than the value determination made by the said independent appraiser, both plaintiff and defendant Liquid may be heard on the reasonableness of such offer. Disposal of said plants shall be made to a person or persons other than (a) a defendant herein, (b)

a stockholder, officer, director, employee, or agent of any defendant herein or (c) any person affiliated, directly or indirectly, with any defendant herein. Disposal of said plants by The Trustee shall be restricted to persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both, and who file with the Court an undertaking so to do.

(4) Defendant Liquid shall take such steps as are necessary to maintain said plants, until the time of disposal thereof by The Trustee, at the defendant's best standards of operating performance applicable to said plants for the manufacture of CO_2 and (in the case of the existing plant located at Indianapolis, Indiana) dry ice. Pending such disposal, defendant Liquid shall not permit said plants to be diminished in capacity or turned to uses other than the manufacture of CO_2 or dry ice. Defendant Liquid shall at all times furnish to The Trustee and prospective purchasers of said plants all information regarding said plants, and permit them to have such access to, and to make such inspection of, said plants as is reasonably necessary. Defendant Liquid shall take all other actions which it is directed by the Court or The Trustee to take in order to disseminate and publicize the availability for sale, and to promote and effectuate the expeditious disposal of said plants.

(5) During the entire period for which The Trustee serves, and at the end of such period, The Trustee shall [fol. 128] render such reports to, and request such instructions from, the Court as may be necessary or appropriate.

(F) Defendants Airco and Liquid are perpetually jointly and severally enjoined, except as permitted in the above subsections of this Section IX and except for emergency purchases, from purchasing or attempting to purchase, directly or indirectly, any CO_2 or dry ice from (1) producers with whom either of said defendants is required by this Section IX of this Final Judgment to cancel contracts or limit purchases or (2) operators of any plant required to be divested by this Section IX of this Final Judgment;

(G) Defendants Airco and Liquid are jointly and severally enjoined from:

(1) increasing the total number of production units for CO_2 and dry ice now located in existing plants;

(2) increasing the aggregate volume of CO_2 and dry ice purchased during the calendar year of 1950 from present suppliers, except for emergency purchases (including for the purposes of this clause purchases pursuant to subsection (A) of Section VI);

(3) erecting any production facilities for CO_2 and dry ice, the construction of which had not begun by the date of entry of this Final Judgment; and

(4) acquiring by purchase contract or otherwise CO_2 or dry ice from suppliers not presently supplying such defendant therewith, except for emergency purchases;

within 400 miles of any plant or production facility which is the subject of or affected by subsections (A) through (E) of this Section IX and which concerns the defendant in question, until such defendant shall have taken all steps required by the applicable provisions of subsections (A) through (E) to be taken by it in respect of such plant or [fol. 129] production facility (which steps may be taken prior to the time provided for in this Final Judgment), and shall have filed with this Court a statement to that effect in each such instance; *provided* that defendant Liquid shall have the right to add one complete CO_2 and/or dry ice production unit to the production facilities in existence on the date of entry of this Final Judgment at its plant located at Urbana, Ohio, *provided* that such unit shall not be put into operation until after the expiration of one year from the date of entry of this Final Judgment and until defendant Liquid has filed with this Court the statement referred to in this subsection (G) with respect to purchases by it from defendant Wyandotte; and *provided* that defendant Airco shall have the right to replace any of its existing regular sources of supply by any of the means specified in clauses (1) and (3) in the event that there is a permanent discontinuance of supply by any such source, any such replacement unit or units to be of no greater capacity than

the unit or units that they replace, or to replace such sources in such event by obtaining CO_2 and/or dry ice from persons who prior thereto had not been engaged in the production thereof, in quantities not in excess of those usually obtained from the replaced source, *provided, further,* that Airco shall not so obtain CO_2 and/or dry ice from any such person if it would be apparent to a reasonably prudent business man that the effect thereof would be to deprive jobbers or distributers of CO_2 or dry ice which they desire to obtain.

X

(A) Defendant Engineering is hereby enjoined and restrained from issuing any license under, instituting or threatening to institute, maintaining or continuing any action or proceeding for acts of infringement, or to collect damages, compensation or royalties under, United States Patent No. 2,025,698 or any license or agreement issued or made in connection therewith except under the license between defendants Engineering and Wyandotte, dated July 1, 1934, as amended;

[fol. 130] (B) Each defendant is hereby enjoined and restrained from instituting or threatening to institute, maintaining or continuing any action or proceeding for acts of infringement, or to collect damages, compensation or royalties alleged to have occurred or accrued prior to the date of this Final Judgment under any patent now owned or controlled by such defendant except actions by defendant Engineering for royalties claimed to be due under the license between defendants Engineering and Wyandotte, dated July 1, 1934, as amended;

(C) Each of the defendants is enjoined and restrained from acquiring any license, sublicense, grant of immunity or similar right under any existing patent or any patent issued or applied for within 10 years from the entry of this Final Judgment unless such license, sublicense, grant of immunity or similar right grants to said defendant a full and unrestricted power to sublicense which said defendant exercises pursuant to the provisions of Section XI herein.

XI

(A) Each of the defendants (except defendant Engineering with respect to defendant Wyandotte prior to Jan. 2, 1953) is ordered and directed, in so far as each has the power to do so, to grant to any person, upon written application therefor, a non-exclusive license to make, use and vend under any, some or all patents (except United States Patent No. 2,025,698) (1) now owned or controlled by such defendant (including those listed in Appendix A attached to this Final Judgment which are so owned or controlled), or (2) which are issued or applied for by such defendant within 10 years from the date of the entry of this Final Judgment, or (3) now existing or which are issued or applied for within the aforesaid 10-year period and under which such defendant has the right to issue a license or sublicense;

(B) Each defendant is hereby enjoined and restrained from making any sale or other disposition of any of said patents which deprives the defendant of the power or [fol. 131] authority to grant such licenses unless it sells, transfers or assigns such patents and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section XI and the purchase, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking so to be bound;

(C) Each defendant is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provision of this Section XI except that:

(1) the license may be non-transferable;

(2) a reasonable non-discriminatory royalty may be charged;

(3) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of CO_2 and dry ice produced under the licensed inventions and of the royalty due and payable thereon;

(4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay

the royalties or to permit the inspection of his books and records as hereinabove provided; and

(5) the license must provide that the licensee may cancel the license at any time upon 30 days' written notice to the licensor;

(D) Within 30 days after the date of application, issuance or acquisition of any patents, to advise this Court and the Attorney General, in writing, of the number and date of such application, issuance or acquisition;

(E) Upon receipt of a written request for a license under the provisions of this Section XI the defendant shall [fol. 132] advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on the defendant owning or controlling the patent or patents to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall be retroactive for the applicant and all other licensees under the same patent or patents to the date the applicant files his application with this Court. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the patents to which the application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of subsection (F) of this Section XI;

(F) Where the applicant has the right to make, use and vend under subsection (E) of this Section XI, said applicant or the defendant owning or controlling the patent or patents may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable rate. If this Court fixes such interim royalty rate, defendant shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, pro-

viding for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or sublicense or fails to pay the interim royalty rate in accordance therewith, such action shall be ground for the dismissal of his application and his right under subsection (E) shall terminate. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by this Court shall be [fol. 133] retroactive for the applicant and all other licensees under the same patent or patents to the date the applicant files his application with this Court;

(G) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents, nor shall this Final Judgment be construed as importing any validity or value to any of the said patents. Nothing herein shall be construed to determine that existing royalty rates are reasonable;

(H) Each of the defendants Liquid, Airco, Wyandotte and Engineering is ordered and directed, for a period of 10 years from the entry of this Final Judgment, to give to each licensee under any patents owned or controlled by the defendant, upon written request therefor, all technical assistance and information in its possession disclosing the methods and processes used by the licensor in its commercial practice under the licensed invention. Wherever practicable such technical assistance and information shall be furnished in writing. However, where not practicable to furnish such assistance and information in writing, technical personnel shall be made available to help install and initiate the operation of the methods and processes by the licensee. Such technical assistance and information shall be charged for at no more than actual cost to the licensor, without allocating any overhead or general administrative expense.

XII

For the purpose of securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon the written

request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, upon reasonable notice to the defendants made to their principal offices, be permitted:

(a) access, during the office hours of said defendants, to all books, ledgers, accounts, correspondence, [fol. 134] memoranda and other records and documents in the possession of or under the control of said defendants relating to any of the matters contained in this Final Judgment; and

(b) subject to the reasonable convenience of said defendants and without restraint or interference from them, to interview the officers and employees of defendants, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, any defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment.

No information obtained by the means provided in this Section XII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XIII

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforce-

ment of compliance therewith and the punishment of violations thereof.

Dated: Brooklyn, New York
March 7, 1952

LEO F. RAYFIEL,
United States District Judge.

[fol. 135]

APPENDIX A TO JUDGMENT

Patents Owned by Liquid Carbonic Corporation

Patent Number	Date of Issue	Patentee	Designation
1,806,240	5/19/31	Donald	The production of carbon dioxide ice
1,992,486	2/26/35	Hunt	Methods of and Apparatus for obtaining Carbon Dioxide
2,012,587	8/27/35	Hunt	Processes of and Apparatus for Manufacturing liquid and solid Carbon Dioxide
2,041,659	5/19/36	Hunt	Compressor for Manufacturing Carbon Dioxide
2,048,656	7/21/36	Hunt and Turner	Methods of and Apparatus for obtaining Carbon Dioxide
2,117,025	5/10/38	Hunt, Pratt, Tirrell and Turner	Methods of and Apparatus for producing Carbon Dioxide
2,205,793	6/25/40	Hunt	Compressor for Manufacturing Carbon Dioxide
2,296,349	9/22/42	Hunt	Methods of and Apparatus for Supplying Gas

[fol. 136]

Patents Owned by Air Reduction Company, Incorporated

Patent Number	Date of Issue	Patentee	Designation
2,020,329	11/12/35	Rudd	Sealed Container Construction
2,026,799	1/ 7/36	Ragonnet	Converter
2,041,516	5/19/36	Rudd	Art of Producing Containers
2,157,019	5/ 2/39	Rudd	System for Charging Carbon Dioxide
2,221,077	11/12/40	Crowe	Gas Supply System
2,224,004	12/ 3/40	Rudd	Sealed Container Construction
2,291,287	7/28/42	Rudd	Art of Charging Converters With Liquefied Gas
2,291,288	7/28/42	Rudd	Art of Dispensing Gas
2,325,045	7/27/43	Dennis	Production of Liquid Carbon Dioxide
2,341,607	2/15/44	Dennis	Production of Liquid Carbon Dioxide
2,341,608	2/15/44	Dennis	Production of Liquid Carbon Dioxide
2,534,597	12/19/50	Hooper	Apparatus for Handling Gases
2,585,288	2/12/52	Van Nuys	Recovery of Carbon Dioxide

Patent Applications Owned by Air Reduction Company, Incorporated

Application No.	Date of Filing	Inventor	Designation
791,139	12/11/47	Bridges	Production of Carbon Dioxide

* * * * *

[fol. 137] SHEARMAN & STERLING & WRIGHT

Boykin C. Wright
Philip A. Carroll
Chauncey B. Garver
Frederick M. Eaton
Frederick W. Jackson
Allen E. Throop
Sanford H. E. Freund
Frederic N. Gilbert
Otto Crouse
Henry James
William A. Patty
George B. Pidot
Patrick J. Growney
Gilbert Kerlin
Garrard Winston
Charles C. Parlin
Wm. Woart Lancaster
Joseph W. Drake
Walter K. Earle
Walter F. Pease
Clifford M. Bowden
Robert Nias West
John A. Wilson
Henry B. Guthrie
Douglas B. Steimle
Thomas F. Fennell II
Grayson M-P. Murphy
Henry Harfield
Andrew Kirkpatrick

Cable "Numlatus"

Telephone: Bowling Green 9-8500

20 Exchange Place, New York 5

May 16, 1952.

Clerk of the Court of the United States
for the Eastern District of New York,
United States Court House,
271 Washington Street,
Brooklyn, New York.

United States of America v. The Liquid Carbonic Corporation, et al.—Civil Action No. 9179.

DEAR SIR:

In Appendix A to the Final Judgment entered in the above action on March 7, 1952, under the heading, "Patent Applications Owned by Air Reduction Company, Incorporated", there is listed Application No. 791,139.

It appears that due to an error this Application number should have been 791,137, but on April 22, 1952, a patent was issued on this Application and such patent number is 2,593,530.

Very truly yours,

SHEARMAN & STERLING & WRIGHT.

DBSteimle

RZD

[fol. 138]

Patents Owned by Wyandotte Chemicals Corporation

Patent Number	Date of Issue	Patentee	Designation
2,507,996	5/16/50	Robinson	Solid carbon dioxide cake packaging apparatus

* * * * *

[fol. 139]

Patents Owned by International Carbonic Engineering Company

Patent Number	Date of Issue	Patentee	Designation
1,993,345	3/ 5/35	Jones	Process of revivifying adsorbents
2,005,650	6/18/35	du Bois	Apparatus for automatically controlling discharge of fluids under pressure into a pressure chamber
2,010,200	8/ 6/35	Rufener and Eichmann	Sealing device for pressure containers
2,012,892	8/27/35	Rice	Refrigerating method and apparatus
2,017,779	10/15/35	Vosburgh	Process for recovering carbon dioxide from a gas mixture
2,018,608	10/21/35	du Bois	Apparatus for the transportation and conservation of ice cream
2,020,189	11/ 5/35	Jones	Method of producing solid bodies of carbon dioxide and the product
2,025,698	12/24/35	Cole and McLaren	Gas solidifying apparatus
2,026,353	12/31/35	Mayer	Method and apparatus for refrigerating with solid refrigerants
2,037,592	4/14/36	Rice	Refrigeration
2,043,163	6/ 2/36	Goosmann	Refrigerating apparatus and method
2,046,260	6/30/36	Goosmann	Apparatus for producing solid carbon dioxide
2,047,099	7/ 7/36	Goosmann	Method and apparatus for freezing liquid carbon dioxide
2,055,158	9/22/36	Rice	Method and apparatus for refrigeration
2,057,058	10/13/36	Rice	Refrigerator shipping container for container cars
2,058,973	10/27/36	Goosmann	Air cooling and conditioning apparatus
2,060,694	11/10/36	Rufener and Eichmann	Refrigerator
2,061,776	11/24/36	Rice	Refrigeration
2,062,971	12/ 1/36	Eichmann	Apparatus for solidifying carbon dioxide
2,065,984	12/29/36	Rice	Refrigeration
2,065,985	12/29/36	Rice	Method and apparatus for refrigeration

[fol. 140]

2,065,986	12/29/36	Rice	Apparatus for refrigeration
2,065,987	12/29/36	Rice	Apparatus for refrigeration
2,067,324	1/12/37	Jones et al.	Refrigerating apparatus and method
2,067,325	1/12/37	Jones et al.	Refrigerating apparatus and method
2,074,256	3/16/37	du Bois	Refrigerating cabinet
2,078,129	4/20/37	du Bois	Refrigerating apparatus
2,090,454	8/17/37	Mayer	Refrigeration apparatus
2,120,943	6/14/38	Schutz	Press apparatus for solid carbon dioxide and the like
2,145,096	1/24/39	Schutz	Apparatus for solidifying and pressing carbon dioxide and the like

Patent Number	Date of Issue	Patentee	Designation
Re-issue 19,950	4/28/36	Rice	Method and apparatus for refrigeration
2,464,089	3/ 8/49	Jones	Method and apparatus for producing composite solid carbon dioxide
2,550,196	4/24/51	Jones	Composite solid carbon dioxide

Patent Applications Owned by International Carbonic Engineering Company

Application No.	Date of Filing	Inventor	Designation
Serial #178,173	8/ 7/50	Jones	Composite solid carbon dioxide

Patents Under Which International Carbonic Engineering Company Has the Right to Issue Licenses or Sublicenses

Patent Number	Date of Issue	Patentee	Designation
2,253,880	8/26/41	Zieber	Apparatus for producing carbon dioxide snow blocks

[fol. 141] We hereby consent to the entry of the foregoing Final Judgement:

For the plaintiff United States of America:

D.H. Morrison

~~A.B.C. Monwamm~~, Assistant Attorney General, Marcus A. Hollabaugh, ~~Meredith~~ Melvin C. Williams, Special Assistants to the Attorney General, Frank J. Parker, United States Attorney for the Eastern District of New York, Sigmund Timberg, Edwin H. Pewett, Samuel F. Caton, W. D. Kilgore, Jr., Attorneys for the United States of America.

For the defendants:

Satterlee, Warfield & Stephens, Attorneys for defendant Liquid Carbonic Corporation, by ~~Alan~~ ~~Myer~~, a Member of the Firm. Shearman & Sterling & Wright, Attorneys for defendants Air Reduction Company, Incorporated and Pure Carbonic, Incorporated, by John A. Wilson, Douglas B. Steimle, Members of the Firm.

[fol. 142] Putney, Twombley, Hall & Skidmore, Attorneys for defendant Wyandotte Chemicals Corporation, by Lemuel Skidmore, a Member of the Firm, Samuel J. Goldberg, David Greer, Attorneys for de-

fendant International Carbonic Engineering Company

[File endorsement omitted.]

[fol. 143] Notice of presentation of order (omitted in printing)

[fol. 144] IN UNITED STATES DISTRICT COURT

Civil Action No. 9179

UNITED STATES OF AMERICA, Plaintiff,

v.

THE LIQUID CARBONIC CORPORATION, et al., Defendants.

FINAL ORDER—Filed September 20, 1954

The United States, the plaintiff in the above action, by notice of motion dated December 24, 1953, having moved this Court for an order carrying out the final judgment entered in this action on March 7, 1952, by ordering defendant Liquid Carbonic Corporation to dispose of its Long Island City, New York and Indianapolis, Indiana plants pursuant to Section IX (E)(1) of the final judgment and for such other and further orders as may seem appropriate and necessary to the Court; and defendant Liquid Carbonic Corporation having appeared and filed an affidavit by W. A. Brown, Jr., President of defendant Liquid Carbonic Corporation, sworn to December 30, 1953, in opposition to said motion; and said motion having duly come on to be heard before me on January 18, 1954, and having heard Alfred Karsted, Esquire, counsel for plaintiff, in support of said motion, and having heard Satterlee, Warfield & Stephens, Esquires, counsel for defendant Liquid Carbonic Corporation (James F. Dwyer, of counsel) in opposition thereto, and a transcript of said hearing having been filed in the office of the Clerk of this Court, and the Court having rendered and filed its decision on May 4, 1954 denying, without

prejudice to a renewal thereof upon a proper showing of good cause therefor, the plaintiff's motion for an order carrying out the final judgment by directing the defendant Liquid Carbonic Corporation to sell the plants in question but granting the plaintiff's motion for such other and further orders as may seem appropriate and necessary to [fol. 145] the Court by enjoining the defendant Liquid Carbonic Corporation from the production at either of said plants of carbon dioxide and/or dry ice; and defendant Liquid Carbonic Corporation having on May 17, 1954 filed a motion for re-argument under Rule 9(h) of this Court; and the plaintiff upon the argument of said motion having requested the Court to extend the provision for injunctive relief to include the use of said plants for storage and/or distribution of carbon dioxide and/or dry ice; and the Court having heard the matter re-argued on June 9, 1954 by Alfred Karsted, Esquire, counsel for the plaintiff, and by Satterlee, Warfield & Stephens, Esquires, counsel for defendant Liquid Carbonic Corporation (James F. Dwyer, of counsel) and a transcript of said hearing having been filed in the office of said Clerk, and the Court having rendered and filed its decision on September 2, 1954 adhering to its decision of May 4, 1954 but modifying its decision by also enjoining the defendant Liquid Carbonic Corporation from using said plants for the storage or distribution of carbon dioxide and/or dry ice;

Now, Therefore, Ordered as follows:

(1) The motion of the United States of America, plaintiff, for an order directing defendant Liquid Carbonic Corporation to dispose of its Long Island City, New York and Indianapolis, Indiana plants is denied without prejudice to a renewal thereof upon a proper showing of good cause therefor; and

(2) defendant Liquid Carbonic Corporation, from and after the sixtieth day from the entry of this order, is enjoined from producing or storing at or distributing from its Long Island City, New York and Indianapolis, Indiana plants carbon dioxide and/or dry ice; provided, however, that if defendant Liquid Carbonic Corporation shall timely

file a notice of appeal from this order, said injunction shall be suspended pending the hearing and determination of said appeal by the Supreme Court of the United States and the entry of the further order of this Court upon the man-
[fol. 146] date of the Supreme Court of the United States with respect to said appeal or the abandonment or discontinuance of said appeal.

Dated: Brooklyn, New York, September 20, 1954.

LEO F. RAYFIEL,
United States District Judge.

[fol. 146a] (File endorsement omitted.)

[fol. 147] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civ. 9179

UNITED STATES OF AMERICA

vs.

THE LIQUID CARBONIC CORP., et al.

OPINION—May 4, 1954

RAYFIEL, J.:

On June 24, 1948, the plaintiff filed its complaint herein charging Liquid Carbonic Corporation and other defendants therein named with violations of sections 1 and 2 of Title 15, U. S. C., commonly known as the Sherman Act, in that, inter alia, they had engaged and were still engaging in an illegal combination and conspiracy to restrain competition and monopolize interstate commerce in connection with the manufacture, sale and distribution of carbon dioxide and dry ice. The defendants filed their respective answers to the complaint, denying generally the substantive allegations thereof.

On the 7th day of March, 1952, after a succession of conferences and negotiations, and with the consent of the sev-
[fol. 148] eral parties hereto, through their respective attorneys, a consent decree was made and entered as the final judgment herein.

In addition to certain injunctive and other relief against various defendants the final judgment provided (See section IX (E) (1), (2), (3), (4) and (5) thereof) for the following divestiture relief against the defendant Liquid Carbonic Corporation, hereinafter referred to as Liquid. It directed that Liquid shall dispose of its plants at Long Island City and Indianapolis as complete units, including real estate, buildings, machinery and appurtenant equipment, within one year from the date of the entry of the final judgment herein, and made provision for the appointment by the Court of a Trustee, through whom the disposal of said plants was to be effected. The term of appointment of said Trustee was to be one year, but the term could be extended upon a showing provided for in the judgment. Subsections (3), (4) and (5) of subdivision (E) of section IX of the judgment made provision, inter alia, for the appointment of an appraiser, and for certain terms and conditions of sale, including one list of classes or descriptions of persons who were disqualified from purchasing the plants, and another to whom the sale thereof was restricted. Proviso was also made for the maintenance and operation of the plants by Liquid at its best standards during the [fol. 149] trusteeship, and for its co-operation with the Trustee and potential purchasers.

Under Section XIII of the final judgment jurisdiction was retained for the purpose of enabling any of the parties to apply to the Court "for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, . . ."

The Court appointed a Trustee in March, 1952, and in March, 1953, extended his term as such to May 1, 1953. Thereafter it was further extended to June 1, 1953, as to the Long Island City plant and November 2, 1953, as to the Indianapolis plant. The Trustee was unable to effect the sale of either of the plants under the terms and conditions of the final judgment and accordingly his appointment terminated on November 2, 1953.

The Government now moves under Section XIII of the

final judgment for an order carrying out the said judgment by directing Liquid to dispose of the said plants, and for such other and further orders as may seem appropriate and necessary to the Court.

Liquid's opposition to the Government's motion rests chiefly on its contention that the only provision in the judgment for the sale of the plants is that provided by Section IX(E) thereof, that is, through the Trustee; that the effort [fol. 150] to effect such a sale failed; that Liquid consented to no other provision for the sale of the plants; and that the granting of the relief sought by the Government would be tantamount to a modification of the judgment beyond the limits of Liquid's consent and contrary to judicial decision. During the argument of the motion herein counsel for Liquid stated that he believed that since the Trustee was unable to effect a sale Liquid had the right to continue operations at the plants in question and intended so to do.

In support of its position Liquid cites the case of Hughes vs. United States, 342 U. S. 353, contending that in that case "a similar situation was presented." The instant case is clearly distinguishable from the Hughes case. The latter had consented to a decree, which provided, among other things, that within a year after the entry of the judgment he (Hughes) should *either* dispose of his holdings of stock *or* deposit the same with a court-appointed trustee under a voting trust agreement which provided that the trustee should possess and be entitled to exercise all the voting rights of such stock, and that the voting trust agreement should continue in force and effect until Hughes had sold his stock. Hughes elected not to sell his stock, and the District Court appointed a trustee and approved a voting trust agreement. Later the District Court, without hearing evidence, and without findings of fact, amended its order [fol. 151] naming a trustee, and directed that the stock be sold.

Clearly the consent decree gave Hughes the right of election, the option to exercise a choice of the alternatives provided for in the decree. His decision to transfer the stock to the trustee was by implication a rejection of the other alternative, the sale of the stock. Mr. Justice Black who wrote the opinion of the Court, characterized the District Court's order directing the sale of the Hughes stock,

made without a hearing, without findings of fact, and without a showing of necessity, as a substantial modification of the original decree. The other cases cited by Liquid, so far as they are offered in support of its contention herein, are inapposite.

It is the Government's contention that the final judgment is clear and unambiguous, that it requires that Liquid be divested of the plants in question, and that the Trustee's failure to find a purchaser under the terms and conditions of the decree in no way relieves Liquid of such requirement; further, that the construction of the decree suggested by Liquid would not reduce the extent of its dominance in the areas served by the plants in question, a result sought to be achieved by the complaint and the decree herein. It contends, also, that by adopting the consent judgment as the judgment of the Court it is conclusively presumed that [fol. 152] disposal of the plants under any circumstances and conditions was necessary to correct the conditions charged in the complaint.

The Government claims that Section IX (E) had two purposes, (1) to divest Liquid of the plants in question, and (2) to attempt to effect the sale thereof to persons who would operate them in competition with Liquid.

I agree that those two purposes were the ultimate goal of the Government so far as the plants in question are concerned, since their accomplishment would not only have reduced the monopolistic power and influence of Liquid charged in the complaint but would also have provided added competition, one of the objectives sought to be obtained. However, I am not in complete agreement with the Government as to the purposes of that provision of the decree. Since the Trustee was unable to secure a purchaser who would manufacture carbon dioxide and dry ice, thereby reducing Liquid's productive capacity *and* adding new competition in the areas involved, it would appear that the next best result, reducing Liquid's productive influence, could be accomplished as effectively by enjoining further production by Liquid at the plants in question as it could by compelling the sale and disposal thereof, and without subjecting Liquid to the possible substantial loss which [fol. 153] might result from a sale under unfavorable circumstances and conditions.

As hereinabove stated, Liquid claims the right to continue production of carbon dioxide and dry ice at the said plants, arguing that its consent was limited to such manner of divestiture as could be accomplished through the medium of the Trustee, and only under the terms and conditions provided in Section IX (E) of the decree. Such an interpretation would do violence to the intent of the final judgment herein. While there were no findings of fact, and the chief substantive allegations of the complaint were denied by the defendants, nevertheless the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto. That it was Liquid's understanding that the effect of the decree would be to proscribe further production activities at the plants in question is evidenced by the fact that W. A. Brown, Jr., President of Liquid, in his affidavit submitted in opposition to the Government's motion for an order directing Liquid to dispose of said plants, stated (referring to the Long Island City plant):

"This plant has been entirely abandoned, is not used at present for storage or any other purpose, and it is not proposed that it will be in the future." An interpretation [fol. 154] such as is suggested by Liquid would have the effect of robbing the Sherman Act of much of its efficacy, and would probably lead again to the conditions which this action and the said Act were designed to prevent.

Of what avail would the decree herein, so far as it applies to the Long Island City and Indianapolis plants, be if its effectiveness depended on such a fortuitous circumstance as the success of the Court-appointed Trustee in effecting the sale thereof within the moderate period of time and under the somewhat restricted terms and conditions provided in the decree? Such a holding would be unrealistic, repugnant to the very purpose of the anti-trust statutes, and tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless.

It is my opinion that the intent and understanding of Liquid in consenting to the final judgment herein is indicated particularly by the last two sentences of subdivision 4

and all of subdivision 5 of Section IX (E) of the decree herein.

The Government's motion for an order directing Liquid to dispose of the Long Island City and Indianapolis plants is denied, without prejudice to a renewal thereof upon a proper showing of good cause therefor, and Liquid is en- [fol. 155] joined from the production at either of said plants of carbon dioxide and/or dry ice.

Settle order on notice.

Dated: May 4, 1954.

Leo F. Rayfiel, United States District Judge.

[fol. 156] In the United States District Court for the Eastern District of New York

Civ. 9179

United States of America, Plaintiff

against

The Liquid Carbonic Corp., et al, Defendants.

Opinion—September 2, 1954

Rayfiel, J.

The plaintiff commenced this action under the Sherman Act, (sections 1 and 2 of Title 15, U. S. C.) charging that the defendant, Liquid Carbonic Corp., hereinafter called Liquid, together with the other defendants herein, engaged in an illegal combination and conspiracy to restrain competition and monopolize interstate commerce in connection with the manufacture, distribution and sale of carbon dioxide and dry ice.

Thereafter the parties consented to the entry of a decree bearing date the 7th day of March, 1952, which provided, inter alia, for the following relief against the defendant Liquid: section IX (E) of the decree directed the sale of [fol. 157] the Long Island City and Indianapolis plants of Liquid by a court-appointed Trustee under terms and conditions therein provided, the sale to be effected within one year from the date of the decree, which time was later ex-

tended to June 1, 1953, as to the Long Island City plant, and to November 2, 1953, as to the Indianapolis plant. The Trustee was unable to obtain a purchaser for either plant.

Section XIII of the judgment provided that "Jurisdiction is retained for the purpose of enabling any of the parties to the Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

Thereafter the Government moved under said section for an order carrying out the judgment by directing Liquid to dispose of its Long Island City and Indianapolis plants, and for such other and further orders as might be deemed appropriate and necessary.

Liquid's opposition to the Government's motion rested chiefly on the premise that the sole method of divestiture [fol. 158] provided by the judgment, viz: the sale through the court-appointed Trustee, had failed of success, and that the granting of the Government's motion would constitute a modification of the judgment beyond Liquid's consent.

On May 4, 1954, the Court, for reasons therein stated, made its decision denying the Government's motion for an order directing Liquid to sell the plants in question.

In the course of the argument on said motion counsel for Liquid stated, in substance, that it was his opinion that since the Trustee had been unable to effect the sale of the said plants under the conditions provided in the judgment Liquid had the right to continue operation thereof, and intended so to do. As hereinabove stated, the Government, in its notice of motion, sought, in addition to an order directing the sale of said plants, "such other and further orders as might be deemed appropriate and necessary." In view of the aforementioned expression of opinion of Liquid's counsel the Court considered it advisable to incorporate in its decision of May 4, 1954, the provision to the effect that Liquid would be enjoined from the production of carbon dioxide and/or dry ice at both of the said plants.

On May 17, 1954, Liquid filed its motion for re-argument under General Rule 9 (h) of the Rules of the United States District for the Southern and Eastern Districts of New

York, stating as its grounds therefor (1) that the matter of [fol. 159] injunctive restrictions was not provided for in the Consent Decree, (2) that it was not sought by the Government in its motion, and (3) that it was not submitted to the Court at the hearing and Liquid was given no opportunity to argue in opposition. On the third ground urged the Court granted leave to re-argue.

As to the second ground urged by Liquid—that injunctive relief was not sought by the Government under its motion —attention is directed to the notice of said motion, which, in substance, asks for an order carrying out the final judgment by directing Liquid to dispose of its Long Island City and Indianapolis plants *and for such other and further orders as might be deemed appropriate and necessary.* Under the said notice of motion the Court could, as it did, deny the specific relief asked for by the Government and, at the same time, grant the injunctive relief provided for in its decision of May 4, 1954.

The remaining ground urged for re-argument, the first, is that the matter of injunctive relief, to which Liquid's motion is addressed, was not provided for in the consent judgment, and in support of that point Liquid argues that the consent decree *required* it to maintain and operate the said plants during the trusteeship. It apparently overlooks or ignores the fact that that provision in the decree was designed to make the plants more attractive to prospective [fol. 160] purchasers from the Trustee. Such purchasers, it may be added, would thereby become competitors of Liquid. The case of Hughes vs. United States, 342, U. S. 353, referred to in the memorandum on re-argument, submitted by Liquid in support of its position on this point, was fully considered by the Court on the argument of the original motion, and was found to be distinguishable from the instant case.

Liquid argues further that if it thought the Government contended that it had any right to the injunctive relief granted by the Court it could have urged that the stoppage of the operation of the Indianapolis plant would be "considerably more of a penalty than a *conditional* order of divestiture with the *right to* operate until sold." (italics added). The above quoted statement, particularly the italicized portion, is at complete variance with what

the Court believes to have been the intent of the decree respecting the matters therein stated. In the opinion of the Court the provision for divestiture of the said plants was not *conditional*. Further, the provision for the operation thereof did not confer a *right* upon Liquid; on the contrary, it imposed a *duty*.

The Liquid memorandum makes entirely inopposite argument when it distinguishes between the Long Island City and Indianapolis plants, and dwells upon the harmful effect which compliance with the Court's injunctive order would have upon the latter, its owner and personnel. The judg- [fol. 161] ment herein, to the entry of which Liquid gave its consent, makes no such distinction.

Liquid further lays great stress on what it characterizes as the Court's substantial modification of the judgment in granting injunctive relief herein. I find it difficult to understand how it can be seriously urged that the injunctive restrictions add a burden on Liquid which was not contemplated by the judgment. A sale of the plants by the Trustee would have imposed an even greater burden, for it would have resulted not only in a discontinuance of operations by Liquid but also in the introduction of additional competition in the areas involved, a prime objective of the Government in the suit. The Court's granting of injunctive relief did not constitute a modification of the decree, as claimed by Liquid. It was merely an interpretation thereof.

In its decision of May 4, 1954, the Court enjoined the production of carbon dioxide and dry ice by Liquid at the Long Island City and Indianapolis plants. The Government, claiming that an order enjoining production alone would be inadequate, has asked the Court to extend the provision for injunctive relief to include storage and/or distribution of the restricted article. Obviously the failure to extend the relief, as requested would nullify, in part at least, the consent decree entered herein. Therefore, in order to effectu- [fols. 162-163] ate what I believe to be the basic purpose of the decree, the Government's application to so extend the injunctive relief herein is granted.

Since it is my opinion that the decision of May 4, 1954, is consistent and in harmony with the consent judgment herein I am constrained to adhere to it, modified, however, so that Liquid shall be enjoined from using the Long Island

City and Indianapolis plants for the production, storage or distribution of carbon dioxide and/or dry ice.

Settle, on notice, the order to be entered on the Court's decision of May 4, 1954, as hereby modified.

Dated September 2, 1954.

Leo F. Rayfiel, United States District Judge.

[fol. 164] Notice of presentation of motion (omitted in printing).

[fol. 165] In United States District Court

[Title omitted]

Motion for Order for Carrying Out Final Judgment—Filed December 28, 1953

Comes now the United States of America, the plaintiff in the above-entitled action, by Alfred Karsted, one of its duly authorized attorneys, and respectfully represents to the Court:

(1) That on June 24, 1948 a civil complaint was filed in the above-entitled action charging the defendant and others with violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, as amended, and praying for the following relief among others:

"That under such terms and conditions and according to such plan or program as may be approved by and subject to the supervision of this Court, the defendants be required:

> (a) To make such divestiture of their businesses, plants, facilities and properties necessary to dissipate the effects of the unlawful activities herein alleged and to establish free and unfettered competition in the trade and commerce herein described;"

(2) That on March 7, 1952 a final judgment was entered by this Court in this case, Section IX(E) of which requires

the defendant Liquid Carbonic Corporation within one year of the date of entry of the judgment to dispose of its existing plants located at Long Island City, New York and Indianapolis, Indiana. Section IX(E) subsections (2) and [fol. 166] (3) of said judgment provided for one method of disposal of said plants, to wit, a trustee was to be appointed by the court for the purpose of disposing of said plants to "persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both, and who file with the court an undertaking so to do."

(3) That on March 17, 1952 a trustee was duly appointed by this Court for the term of one year pursuant to the provisions of Section IX (E) subsection (2) of said judgment to effect the disposal of said plants as provided by Section IX (E) subsections (2) and (3) of said judgment. In March, 1953 the Court, upon its own motion, entered an order extending the term of the trustee to May 1, 1953. In April, 1953, again on the Court's own motion, the trustee's term was extended until June 1, 1953, in regard to the disposal of the Long Island City plant and until November 2, 1953, in regard to the disposal of the Indianapolis plant.

(4) That by the end of the trustee's term, to wit, November 2, 1953, the trustee had been unable to dispose of said plants to persons who intended to operate said plants in the manner prescribed in Section IX (E) subsection (3) and on November 2, 1953 the said trustee's appointment was terminated in all respects, and as of the date of the filing of this Motion defendant Liquid has not disposed of either of said plants as required by said Section IX of said judgment.

(5) That in Section XIII of said judgment the Court retained jurisdiction for the purpose of enabling any of the parties to the judgment to apply to the Court for such orders and directions as may be necessary or appropriate for the carrying out of the judgment and the enforcement of compliance therewith.

WHEREFORE, movant, pursuant to Section XIII of said judgment, prays for an order of this Court carrying out said [fol. 167] judgment by directing said defendant Liquid Carbonic Corporation to dispose of said plants as ordered

and directed in Section IX (E) (1) of said final judgment and for such other and further orders as may seem appropriate and necessary to the Court.

Dated: December 24, 1953.

Alfred Karsted, Attorney for Plaintiff, United States of America.

[fol. 167a] [File endorsement omitted.]

[fol. 168] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed January 13, 1954

STATE OF ILLINOIS,
County of Cook, ss:

W. A. BROWN, Jr., being duly sworn, deposes and says:

1. I am the President of The Liquid Carbonic Corporation (Liquid), a defendant in this action, and am familiar with the matters discussed in this affidavit.

2. I make this affidavit in opposition to the Government's "Motion for Order for Carrying Out Final Judgment," returnable on January 4, 1954.

3. I am not only familiar with the negotiations which led up to the consent by Liquid to the entry of the final judgment on March 7, 1952, but was personally present and took part in the final discussions at which agreement on the terms of the decree was reached. At no time was any mention made of any obligation on the part of Liquid to sell its Long Island City or Indianapolis plants other than is specifically provided in the decree. The decree provides specifically for the manner and the period of time within which these plants were to be sold. There is no provision for any sale other than through a trustee, and that, naturally, only during the trustee's term of office. Any varia-

[fol. 169] tion or enlargement of Liquid's obligations as proposed by the Government would be entirely contrary to the understanding on which Liquid consented to the entry of the decree.

4. The Long Island City plant is for sale and has been since the end of the Trustee's term of office. No acceptable bid for this property has been received. This plant has been entirely abandoned, is not used at present for storage or any other purpose, and it is not proposed that it will be used in the future. It is quite probable that this property could and would have been sold at a satisfactory price during the period when a sale by us was prevented by the terms of the decree; viz., according to advice received by us from our real estate agents, Cross & Brown, market conditions in that section were very substantially better during the period when the Trustee was in office than they are at present, and in some instances the offering prices of neighboring properties have been reduced by as much as 50 per cent. Although this plant will be sold as soon as a satisfactory offer can be obtained, I do not consider that Liquid is or should be further obligated under the decree in any way with respect to the disposal of that plant.

5. The Indianapolis plant is not at present for sale. Liquid's chief competitors in Indianapolis are the Pure Carbonic Company and National Cylinder Gas Company. I am certain that, should the Indianapolis plant be sold for purposes other than CO_2 manufacture and Liquid's position correspondingly weakened in that territory, those two competitors would be the principal beneficiaries and competition in that area would be lessened rather than promoted.

[fol. 170] 6. I consented to the entry of this decree on behalf of Liquid for one reason and one reason only: to save money. The losses (in the case of the Long Island City plant, as above mentioned) and expenses incidental to these divestiture provisions, which were considered by us then and now as being meaningless and futile, have been entirely out of all proportion to what was reasonably contemplated. The proceedings incident to this motion, which no one familiar with this industry could possibly think could have

any bearing on competitive conditions, further increases such expenses.

W. A. Brown, Jr.

Subscribed and sworn to before me this 30th day of December, 1953. Paul M. Johnson, Notary Public.

[fol. 170a] [File endorsement omitted.]

[fol. 171] In United States District Court

[Title omitted]

Motion for Re-Argument—Filed May 18, 1954

Sirs:

Please take notice that the undersigned will move this Court for: (1) leave to re-argue the motion by the plaintiff for an Order Carrying Out Final Judgment, which said motion was decided May 4, 1954 by this Court in the opinion and determination of Hon. Leo Rayfiel, District Judge; and (2) such other and further relief as may be just and proper in the premises.

Please take further notice that the foregoing motion will be brought on for hearing before this Court at Room 727 United States Court House Borough of Brooklyn, City and State of New York, on the 2nd day of June, 1954 at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard.

Dated. New York, New York, May 17, 1954.

Satterlee, Warfield & Stephens, by James C. Stephens, A Partner, Attorneys for Defendant, The Liquid Carbonic Corporation, Office and Post Office address, 49 Wall Street, New York 5, New York.

[fol. 172] To: Alfred Karsted, Esq., Department of Justice, Washington, D. C., Anti-Trust Division, Room 235,

U. S. Court House, Foley Square, New York 7, New York
Hon. Leonard P. Moore, United States Attorney Eastern
District of New York, 271 Washington Street Brooklyn 2
New York.

[fol. 172a] [File endorsement omitted.]

[fol. 173] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 27, 1954

I. Notice is hereby given that the defendant, The Liquid Carbonic Corporation (hereinafter referred to as "Liquid") hereby appeals to the Supreme Court of the United States from:

(1) so much of the final order, dated September 20, 1954 and entered in this action on said date, on plaintiff's motion for an order carrying out the final judgment herein, dated and entered March 7, 1952, as enjoined the defendant Liquid from producing, storing or distributing carbon dioxide and dry ice or either of them from its plants located at Long Island City, New York, and Indianapolis, Indiana;

(2) the final judgment dated and entered herein March 7, 1952 in so far as said final judgment was modified amended or enlarged by said final order of September 20 1954, entered herein on said date.

This appeal is taken pursuant to 15 U. S. C. § 29.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the [fol. 174] Supreme Court of the United States and include in said transcript the following:

(1) The complaint, dated June 24, 1948;

(2) The answer of defendant Liquid, dated October 1 1948;

(3) The final judgment dated and entered herein March 7, 1952;

(4) The final order of the District Court dated and entered herein, September 20, 1954;

(5) The opinions of Honorable Leo F. Rayfiel, District Judge, rendered and filed herein under dates of May 4, 1954 and September 2, 1954, respectively;

(6) Motion of plaintiff to carry out final judgment which motion is dated December 24, 1953;

(7) The affidavit of W J. Brown sworn to December 30, 1953 filed in opposition to the foregoing motion;

(8) The transcript of the hearings held before Honorable Leo F. Rayfiel on January 18, 1954 and June 9, 1954;

(9) Motion of defendant Liquid for reargument, dated May 17, 1954;

(10) Notice of Appeal dated October 27, 1954.

III. The following questions are presented by this appeal:

(1) Did the District Court err in making the final order appealed from?

(2) Had the District Court, under the circumstances and conditions presented by the record herein, power to grant the injunctive relief contained in the order appealed from? [fol. 175] (3) May the final judgment entered in this action on Liquid's consent properly be construed to compel Liquid to desist from the use of its plants at Long Island City, New York, and Indianapolis, Indiana, as required by the order appealed from?

(4) Does the injunctive relief granted by the District Court deprive Liquid of its property without due process of law?

(5) Does the prohibition against Liquid's use of its plants as specified in the order appealed from, amount to a confiscation of Liquid's property without Liquid's consent?

(6) If the District Court had the power to enjoin Liquid as in the order appealed from, was the exercise of such power in the light of the record here, unwarranted and arbitrary?

Dated: October 27, 1954.

James F. Dwyer, Attorney for the defendant, The Liquid Carbonic Corporation, 49 Wall Street, New York 5, N. Y.

[fol. 175a] [File endorsement omitted.]

[fols. 176-177] Proof of service [omitted in printing.]

[fol. 178] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 477

THE LIQUID CARBONIC CORPORATION, Appellant,

vs.

UNITED STATES OF AMERICA

ORDER NOTING PROBABLE JURISDICTION—February 14, 1955

Appeal from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

Mr. Justice Clark took no part in the consideration or decision of this question.

Supreme Court, U.
FILED
DEC 11 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 472 '25

UNITED STATES OF AMERICA,
Appellee,

against

THE LIQUID CARBONIC CORPORATION,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT AND APPENDICES.

JAMES F. DWYER,
Attorney for Appellant,
49 Wall Street,
New York 5, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

UNITED STATES OF AMERICA,

Appellee,

against

THE LIQUID CARBONIC CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT.

Appeal from a final order of the United States District Court for the Eastern District of New York (Rayfiel, D. J.), which modified a final decree that had been entered on consent in an action brought pursuant to Section 4 of the Act of Congress of July 2, 1890 (C. 647, 26 Stat. 209; 15 U. S. C. §4) for alleged violations of Sections 1 and 2 of said act (*id.*, 15 U. S. C. §§1, 2).

Opinions Below.

No opinion was delivered upon the rendering of the consent decree. Thereafter the Government moved "for an order carrying out the said judgment" by directing appellant to dispose of certain of its plants in a manner not provided for in the decree. This motion was denied without prejudice to a renewal upon a proper showing of good cause, but the court directed that appellant be enjoined

from production at said plants. The decision on this motion, dated and entered on May 4, 1954 is reported in 121 F. Supp. 141 and a copy is annexed hereto as Appendix A. No order was entered upon such decision. Appellant moved for a reargument on the grounds that injunctive restrictions were not provided for in the consent decree, that they had not been sought by the government in its motion and that appellant had had no opportunity to argue in opposition. Reargument on the last ground was granted. The opinion on such reargument was dated and entered on September 2, 1954, and is reported in 123 F. Supp. 653. A copy thereof is annexed hereto as Appendix B. Upon the foregoing last mentioned decision, the final order from which this appeal is taken was entered on September 20, 1954.

There have been no other opinions in this case (there has been no companion case) to which reference may be necessary to ascertain the grounds of the judgment or the final order.

The District Court has not separately made any findings of fact or conclusions of law.

Jurisdiction.

The grounds upon which the appellant invokes the jurisdiction of this Court are as follows:

(i) The action, in which the final order appealed from was entered, was instituted by the appellee against appellant and three other corporations to prevent and restrain alleged violations of Sections 1 and 2 of the Act of July 2, 1890 (15 U. S. C., §§ 1 and 2), in pursuance of Section 4 of the Act of Congress of July 2, 1890 (Title 15, U. S. C., §4, C. 647, 26 Stat. 209).

(ii) This appeal is from a final order entered below on September 20, 1954, on motion of the appellee, and over the opposition of the appellant, modifying and enlarging upon the final judgment herein which had been entered on consent on March 7, 1952. No order respecting a rehearing of the order appealed from has been made. Notice of Appeal to this Court was served and filed in the United States District Court for the Eastern District of New York on October 27, 1954.

(iii) Appellant believes that the provisions which confer on this Court jurisdiction of this appeal are found in Title 15 U. S. C., § 29 (Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989).

(iv) Cases which appellant believes sustain this Court's jurisdiction of this appeal are:

Hughes v. *United States*, 342 U. S. 353;
Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502;
Swift & Company v. *United States*, 276 U. S. 311.

Questions Presented.

The questions presented by this appeal are as follows:

1. Whether the District Court erred in enjoining appellant from producing, storing or distributing carbon dioxide and dry ice or either of them, at its plants at Long Island City, New York, and Indianapolis, Indiana.

2. Whether the District Court had the power, without holding any hearing, taking any testimony or making any findings, to make the order appealed from granting injunctive relief.

3. Whether the District Court in making the order appealed from exceeded the jurisdiction reserved in the consent decree.

4. Whether the District Court had power to make any order herein other than one in accord with and limited to the decree consented to by the parties.

5. Whether the order entered herein without appellant's consent and without a hearing or findings and enjoining the use of appellant's property deprives appellant of its property without due process of law or constitutes confiscation thereof.

6. Whether the District Court erred in modifying the consent decree previously entered and in making the order appealed from.

Statement of the Case.

The complaint in this case charges that appellant and others engaged in an illegal combination and conspiracy to restrain trade and monopolize interstate commerce in connection with the manufacture, distribution and sale of carbon dioxide and dry ice. The appellant, and each other defendant, filed an answer denying all the material allegations of the complaint. Thereafter, and without a trial or hearing, final judgment was entered on March 7, 1952, on the consent of appellant, the appellee and all other defendants. A full copy of said consent judgment appears in the record, but for the Court's convenience Section IX(E) thereof, which has particular significance on this appeal, is annexed as Appendix C. The terms of said decree have, appellant submits, been fully complied with. Appellee,

however, maintains, and has, in part, been sustained by the District Court in the order appealed from, that the conditions under which, alone, appellant was to dispose of certain of its plants (see Appendix C and next paragraph hereof) may be ignored; that it may be forced to rid itself of said plants or the use thereof in a manner not provided for by the consent decree.

Under the terms of subsections (1) to (5) of said Section IX(E), appellant was required, within one year from the date of the decree, to sell two of its plants located respectively at Long Island City, New York, and Indianapolis, Indiana, but subject to the terms and conditions there set forth, viz: the plants were to be disposed of "as complete units," and as going concerns; the sale was to be made only to persons who intended and undertook to operate the plants for the manufacture of the same products (that is, competitors or potential competitors of appellant); the sale was to be made within one year, or an extended period if it should appear that "there may be persons who have an interest in purchasing the said plants," by a trustee, acting as an officer of the Court and at a price to be "determined by the Court, having due regard" to appraised value thereof. In the interim, pending such sale, appellant was required to maintain and operate said plants at full capacity.

Appellant did not consent, and the decree did not provide that the plants should be otherwise sold or their use discontinued. The disposal of the plants and the consequent discontinuance of their use by appellant were expressly made contingent upon the conditions outlined above.

A trustee was appointed and efforts were made to procure a purchaser meeting the requirements set forth in the decree during the initial period of one year, as extended.

The trustee's inability to dispose of the plants in the manner prescribed having been conceded, his appointment was terminated in all respects on November 2, 1953. (See opinion of May 4, 1954, Appendix A.)

Thereafter, and by notice of motion dated December 24, 1953, the appellee moved, purportedly under the District Court's reservation of jurisdiction (Section XIII of the final judgment), for an order "carrying out said judgment" by directing appellant "to dispose of said plants as ordered and directed by Section IX(E)(1) of said final judgment," and for other, unspecified relief (Motion papers, last paragraph).

After argument of the motion, the District Court held:

> "The Government's [appellee's] motion for an order directing Liquid [appellant] to dispose of the Long Island City and Indianapolis plants is denied, without prejudice to a renewal thereof upon a proper showing of good cause therefor, and Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice." (Opinion of May 4, 1953; Appendix A hereto.)

Thereafter appellant moved for reargument, and after reargument, the District Court adhered to its original decision in all respects except that it enlarged the injunctive relief against appellant so as to enjoin appellant not only "from using the Long Island City and Indianapolis plants for the production," but also for the "storage or distribution of carbon dioxide and dry ice." In short, appellant was deprived of any possible gainful use of these plants in its business, the business conducted there was to be destroyed, and the sales value of the plants reduced to a minimum, all over the opposition of the appellant and in the absence of proof that appellant had violated any law.

Importance of Questions Presented.

The constitutional guaranties of due process and of security of property are here involved. The appellant has never been shown to have violated or threatened to violate any provision of the Sherman Act; there has been no proof and no findings or concession that it ever did so. It consented that specific relief be granted as against it; to that extent, and to that extent only, could any decree be rendered.

The judgment entered on consent was binding on the parties to the agreement, as well as on the Court. Yet the District Judge, without evidence or findings of fact, and over appellant's protests, has changed the consent decree and provided for additional relief to which appellant never consented. In so doing, he has in effect held appellant's agreement, embodied in the consent decree, that two of its plants would be sold if the trustee appointed by the Court could produce a qualified purchaser or purchasers ready and able to buy these plants as going concerns at a reasonable price, to constitute an agreement to abandon all use of said plants in appellant's business, if no sale could be effected in the manner agreed upon.

There is a vast difference, both in the result upon the appellant and in the purpose aimed at, between the provisions for sale in the consent decree and the attempt of the order appealed from to compel appellant in effect to scrap the plants, and lose their value, without in any way widening the competitive arena.

Clearly the appellee could not relitigate the issues raised by the pleadings and disposed of by the decree to which it and all defendants had consented. Even if it could, the taking of testimony and the making of findings was a prerequisite to any further decree. In the absence of these the relief granted manifestly results in depriving the appellant of its property without due process of law.

In order to justify his action the District Judge has emasculated the principle of law sustained by this court in *Hughes* v. *United States,* 342 U. S. 353. There the appellant had consented to a decree requiring him within a year to sell his stock, or to deposit it with a trustee under a voting trust to remain in force until he should sell such stock. He chose the latter alternative. As stated in the opinion of this Court,

> "Later, by motion the United States sought a court order forcing the trustee to sell Hughes' stock. Without evidence or findings of fact, and over Hughes' protests, the District Court amended its order appointing a trustee by providing that 'if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20th, 1953, the trustee shall dispose of such stock within two years thereafter' " (342 U. S. at 356).

This Court held that "it was error to enter an order forcing Hughes to sell his stock"; that, as to him "there had been no adequate hearing of this issue" of the compulsory divestment of his stock, saying further,

> "Neither when the present order was considered nor when the original decree was entered were any findings of fact made to support an order of compulsory sale of Hughes' stock. As previously pointed out the consent of Hughes did not include consent to make him sell" (*id.*, pp. 357-8).

In the instant case the District Court sought to avoid the effect of the *Hughes* opinion on the ground that there the appellant had been given an option, of which he could not be deprived. (Opinion of May 4, Appendix A hereto.) This may be a difference but it is not a distinction. By the consent decree in the *Hughes* case, he was required to

sell only in the event that he did not place his stock in trust. In the case at bar appellant was required to sell only under the specified conditions. There was no consent, and no provision for discontinuing the use of the plants if not sold.

There is obviously no basis for the District Court's holding that the rule of the *Hughes* case does not apply here.

Moreover, there is here presented the fundamental question whether consent to a limited decree may be used as a means of entrapment; whether a defendant which has joined with the plaintiff in consenting to the granting of specific relief, and which has fully complied with all that it was required to do by the terms of the decree entered on such consent, can later be compelled by the court, under the guise of construction or enforcement, to submit to any other form or extent of relief which the court may devise.

This goes not only to the matter of hearing, evidence and findings, but also to the effect of a consent decree, viz., whether, like any other judgment, it may not be set aside where there was neither mistake nor fraud in its procurement, and where jurisdiction for the making of the consent decree was present.

Conclusion.

Probable jurisdiction should be noted.

December 10, 1954.

Respectfully submitted,

James F. Dwyer,
Attorney for Appellant,
49 Wall Street,
New York 5, N. Y.

Appendix A.

Opinion of Rayfiel, D. J., of May 4, 1954.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA *vs.* THE LIQUID CARBONIC CORP., *et al.*	Civ. 9179

Appearances:

ALFRED KARSTED, Esq., Attorney for Plaintiff, for the motion.

SATTERLEE, WARFIELD & STEPHENS, Esqs., Attorneys for Defendant, by JAMES F. DWYER, Esq., in opposition.

RAYFIEL, J.

On June 24, 1948, the plaintiff filed its complaint herein charging Liquid Carbonic Corporation and other defendants therein named with violations of sections 1 and 2 of Title 15, U. S. C., commonly known as the Sherman Act, in that, *inter alia,* they had engaged and were still engaging in an illegal combination and conspiracy to restrain competition and monopolize interstate commerce in connection with the manufacture, sale and distribution of carbon dioxide and dry ice. The defendants filed their respective answers to the complaint, denying generally the substantive allegations thereof.

On the 7th day of March, 1952, after a succession of conferences and negotiations, and with the consent of the

several parties hereto, through their respective attorneys, a consent decree was made and entered as the final judgment herein.

In addition to certain injunctive and other relief against various defendants the final judgment provided (See section IX (E) (1), (2), (3), (4) and (5) thereof) for the following divestiture relief against the defendant Liquid Carbonic Corporation, hereinafter referred to as Liquid. It directed that Liquid shall dispose of its plants at Long Island City and Indianapolis as complete units, including real estate, buildings, machinery and appurtenant equipment, within one year from the date of the entry of the final judgment herein, and made provision for the appointment by the Court of a Trustee, through whom the disposal of said plants was to be effected. The term of appointment of said Trustee was to be one year, but the term could be extended upon a showing provided for in the judgment. Subsections (3), (4) and (5) of subdivision (E) of section IX of the judgment made provision, *inter alia*, for the appointment of an appraiser, and for certain terms and conditions of sale, including one list of classes or descriptions of persons who were disqualified from purchasing the plants, and another to whom the sale thereof was restricted. Proviso was also made for the maintenance and operation of the plants by Liquid at its best standards during the trusteeship, and for its co-operation with the Trustee and potential purchasers.

Under Section XIII of the final judgment jurisdiction was retained for the purpose of enabling any of the parties to apply to the Court "for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, . . ."

The Court appointed a Trustee in March, 1952, and in March, 1953, extended his term as such to May 1, 1953. Thereafter it was further extended to June 1, 1953, as to the Long Island City plant and November 2, 1953, as to the

Indianapolis plant. The Trustee was unable to effect the sale of either of the plants under the terms and conditions of the final judgment and accordingly his appointment terminated on November 2, 1953.

The Government now moves under Section XIII of the final judgment for an order carrying out the said judgment by directing Liquid to dispose of the said plants, and for such other and further orders as may seem appropriate and necessary to the Court.

Liquid's opposition to the Government's motion rests chiefly on its contention that the only provision in the judgment for the sale of the plants is that provided by Section IX(E) thereof, that is, through the Trustee; that the effort to effect such a sale failed; that Liquid consented to no other provision for the sale of the plants; and that the granting of the relief sought by the Government would be tantamount to a modification of the judgment beyond the limits of Liquid's consent and contrary to judicial decision. During the argument of the motion herein counsel for Liquid stated that he believed that since the Trustee was unable to effect a sale Liquid had the right to continue operations at the plants in question and intended so to do.

In support of its position Liquid cites the case of *Hughes* vs. *United States*, 342 U. S. 353, contending that in that case "a similar situation was presented." The instant case is clearly distinguishable from the *Hughes* case. The latter had consented to a decree, which provided, among other things, that within a year after the entry of the judgment he (Hughes) should *either* dispose of his holdings of stock *or* deposit the same with a court-appointed trustee under a voting trust agreement which provided that the trustee should possess and be entitled to exercise all the voting rights of such stock, and that the voting trust agreement should continue in force and effect until Hughes had sold his stock. Hughes elected not to sell his stock, and the District Court appointed a trustee and approved a voting trust agreement. Later the District Court, without hearing evidence, and without findings of fact, amended its order naming a trustee, and directed that the stock be sold.

Clearly the consent decree gave Hughes the right of election, the option to exercise a choice of the alternatives provided for in the decree. His decision to transfer the stock to the trustee was by implication a rejection of the other alternative, the sale of the stock. Mr. Justice Black who wrote the opinion of the Court, characterized the District Court's order directing the sale of the Hughes stock, made without a hearing, without findings of fact, and without a showing of necessity, as a substantial modification of the original decree. The other cases cited by Liquid, so far as they are offered in support of its contention herein, are inapposite.

It is the Government's contention that the final judgment is clear and unambiguous, that it requires that Liquid be divested of the plants in question, and that the Trustee's failure to find a purchaser under the terms and conditions of the decree in no way relieves Liquid of such requirement; further, that the construction of the decree suggested by Liquid would not reduce the extent of its dominance in the areas served by the plants in question, a result sought to be achieved by the complaint and the decree herein. It contends, also, that by adopting the consent judgment as the judgment of the Court it is conclusively presumed that disposal of the plants under any circumstances and conditions was necessary to correct the conditions charged in the complaint.

The Government claims that Section IX (E) had two purposes, (1) to divest Liquid of the plants in question, and (2) to attempt to effect the sale thereof to persons who would operate them in competition with Liquid.

I agree that those two purposes were the ultimate goal of the Government so far as the plants in question are concerned, since their accomplishment would not only have reduced the monopolistic power and influence of Liquid charged in the complaint but would also have provided added competition, one of the objectives sought to be obtained. However, I am not in complete agreement with the Government as to the purposes of that provision of

the decree. Since the Trustee was unable to secure a purchaser who would manufacture carbon dioxide and dry ice, thereby reducing Liquid's productive capacity *and* adding new competition in the areas involved, it would appear that the next best result, reducing Liquid's productive influence, could be accomplished as effectively by enjoining further production by Liquid at the plants in question as it could by compelling the sale and disposal thereof, and without subjecting Liquid to the possible substantial loss which might result from a sale under unfavorable circumstances and conditions.

As hereinabove stated, Liquid claims the right to continue production of carbon dioxide and dry ice at the said plants, arguing that its consent was limited to such manner of divestiture as could be accomplished through the medium of the Trustee, and only under the terms and conditions provided in Section IX (E) of the decree. Such an interpretation would do violence to the intent of the final judgment herein. While there were no findings of fact, and the chief substantive allegations of the complaint were denied by the defendants, nevertheless the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto. That it was Liquid's understanding that the effect of the decree would be to proscribe further production activities at the plants in question is evidenced by the fact that W. A. Brown, Jr., President of Liquid, in his affidavit submitted in opposition to the Government's motion for an order directing Liquid to dispose of said plants, stated (referring to the Long Island City plant): "This plant has been entirely abandoned, is not used at present for storage or any other purpose, and it is not proposed that it will be in the future." An interpretation such as is suggested by Liquid would have the effect of robbing the Sherman Act of much of its efficacy, and would probably lead again to the conditions which this action and the said Act were designed to prevent.

Of what avail would the decree herein, so far as it applies to the Long Island City and Indianapolis plants, be if its effectiveness depended on such a fortuitous circumstance as the success of the Court-appointed Trustee in effecting the sale thereof within the moderate period of time and under the somewhat restricted terms and conditions provided in the decree? Such a holding would be unrealistic, repugnant to the very purpose of the anti-trust statutes, and tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless.

It is my opinion that the intent and understanding of Liquid in consenting to the final judgment herein is indicated particularly by the last two sentences of subdivision 4 and all of subdivision 5 of Section IX (E) of the decree herein.

The Government's motion for an order directing Liquid to dispose of the Long Island City and Indianapolis plants is denied, without prejudice to a renewal thereof upon a proper showing of good cause therefor, and Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice.

Settle order on notice.

Dated: May 4, 1954.

LEO F. RAYFIEL,
United States District Judge.

Appendix B.

Opinion of Rayfiel, D. J., of September 2, 1954.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA Plaintiff, *against* THE LIQUID CARBONIC CORP., *et al*, Defendants.	Civ. 9179.

Appearances:

Satterlee, Warfield & Stephens, Esqs.,
James F. Dwyer, Esq., of counsel, Attorneys for defendant, for the motion.

Alfred Karsted, Esq., Department of Justice, Washington, D. C., in opposition.

RAYFIEL, J.

The plaintiff commenced this action under the Sherman Act, (sections 1 and 2 of Title 15, U. S. C.) charging that the defendant, Liquid Carbonic Corp., hereinafter called Liquid, together with the other defendants herein, engaged in an illegal combination and conspiracy to restrain competition and monopolize interstate commerce in connection with the manufacture, distribution and sale of carbon dioxide and dry ice.

Thereafter the parties consented to the entry of a decree bearing date the 7th day of March, 1952, which provided, *inter alia,* for the following relief against the defendant

Liquid: section IX (E) of the decree directed the sale of the Long Island City and Indianapolis plants of Liquid by a court-appointed Trustee under terms and conditions therein provided, the sale to be effected within one year from the date of the decree, which time was later extended to June 1, 1953, as to the Long Island City plant, and to November 2, 1953, as to the Indianapolis plant. The Trustee was unable to obtain a purchaser for either plant.

Section XIII of the judgment provided that "Jurisdiction is retained for the purpose of enabling any of the parties to the Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

Thereafter the Government moved under said section for an order carrying out the judgment by directing Liquid to dispose of its Long Island City and Indianapolis plants, and for such other and further orders as might be deemed appropriate and necessary.

Liquid's opposition to the Government's motion rested chiefly on the premise that the sole method of divestiture provided by the judgment, viz: the sale through the court-appointed Trustee, had failed of success, and that the granting of the Government's motion would constitute a modification of the judgment beyond Liquid's consent.

On May 4, 1954, the Court, for reasons therein stated, made its decision denying the Government's motion for an order directing Liquid to sell the plants in question.

In the course of the argument on said motion counsel for Liquid stated, in substance, that it was his opinion that since the Trustee had been unable to effect the sale of the said plants under the conditions provided in the judgment Liquid had the right to continue operation thereof, and intended so to do. As hereinabove stated, the Government, in its notice of motion, sought, in addition to an order

directing the sale of said plants, "such other and further orders as might be deemed appropriate and necessary." In view of the aforementioned expression of opinion of Liquid's counsel the Court considered it advisable to incorporate in its decision of May 4, 1954, the provision to the effect that Liquid would be enjoined from the production of carbon dioxide and/or dry ice at both of the said plants.

On May 17, 1954, Liquid filed its motion for re-argument under General Rule 9 (h) of the Rules of the United States District for the Southern and Eastern Districts of New York, stating as its grounds therefor (1) that the matter of injunctive restrictions was not provided for in the Consent Decree, (2) that it was not sought by the Government in its motion, and (3) that it was not submitted to the Court at the hearing and Liquid was given no opportunity to argue in opposition. On the third ground urged the Court granted leave to re-argue.

As to the second ground urged by Liquid—that injunctive relief was not sought by the Government under its motion—attention is directed to the notice of said motion, which, in substance, asks for an order carrying out the final judgment by directing Liquid to dispose of its Long Island City and Indianapolis plants *and for such other and further orders as might be deemed appropriate and necessary.* Under the said notice of motion the Court could, as it did, deny the specific relief asked for by the Government and, at the same time, grant the injunctive relief provided for in its decision of May 4, 1954.

The remaining ground urged for re-argument, the first, is that the matter of injunctive relief, to which Liquid's motion is addressed, was not provided for in the consent judgment, and in support of that point Liquid argues that the consent decree *required* it to maintain and operate the said plants during the trusteeship. It apparently overlooks or ignores the fact that that provision in the decree was designed to make the plants more attractive to prospective purchasers from the Trustee. Such purchasers, it may be added, would thereby become competitors of Liquid. The

case of *Hughes* vs. *United States,* 342 U. S. 353, referred to in the memorandum on re-argument, submitted by Liquid in support of its position on this point, was fully considered by the Court on the argument of the original motion, and was found to be distinguishable from the instant case.

Liquid argues further that if it thought the Government contended that it had any right to the injunctive relief granted by the Court it could have urged that the stoppage of the operation of the Indianapolis plant would be "considerably more of a penalty than a *conditional* order of divestiture with the *right* to operate until sold." (Italics added.) The above quoted statement, particularly the italicized portion, is at complete variance with what the Court believes to have been the intent of the decree respecting the matters therein stated. In the opinion of the Court the provision for divestiture of the said plants was not *conditional.* Further, the provision for the operation thereof did not confer a *right* upon Liquid; on the contrary, it imposed a *duty.*

The Liquid memorandum makes entirely inapposite argument when it distinguishes between the Long Island City and Indianapolis plants, and dwells upon the harmful effect which compliance with the Court's injunctive order would have upon the latter, its owner and personnel. The judgment herein, to the entry of which Liquid gave its consent, makes no such distinction.

Liquid further lays great stress on what it characterizes as the Court's substantial modification of the judgment in granting injunctive relief herein. I find it difficult to understand how it can be seriously urged that the injunctive restrictions add a burden on Liquid which was not contemplated by the judgment. A sale of the plants by the Trustee would have imposed an even greater burden, for it would have resulted not only in a discontinuance of operations by Liquid but also in the introduction of additional competition in the areas involved, a prime objective of the Government in the suit. The Court's granting of injunctive relief did not constitute a modification of the decree, as claimed by Liquid. It was merely an interpretation thereof.

In its decision of May 4, 1954, the Court enjoined the production of carbon dioxide and dry ice by Liquid at the Long Island City and Indianapolis plants. The Government, claiming that an order enjoining production alone would be inadequate, has asked the Court to extend the provision for injunctive relief to include storage and/or distribution of the restricted article. Obviously the failure to extend the relief, as requested would nullify, in part at least, the consent decree entered herein. Therefore, in order to effectuate what I believe to be the basic purpose of the decree, the Government's application to so extend the injunctive relief herein is granted.

Since it is my opinion that the decision of May 4, 1954, is consistent and in harmony with the consent judgment herein I am constrained to adhere to it, modified, however, so that Liquid shall be enjoined from using the Long Island City and Indianapolis plants for the production, storage or distribution of carbon dioxide and/or dry ice.

Settle, on notice, the order to be entered on the Court's decision of May 4, 1954, as hereby modified.

Dated: September 2, 1954.

/s/ Leo F. Rayfiel,
United States District Judge.

Appendix C.

Copy of Section IX (E) of the Consent Judgment.

(E) (1) Within one year from the date of entry of this Final Judgment, defendant Liquid shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana, hereinafter referred to singularly and collectively as "said plants." Reference to said plants in this Final Judgment shall include all real estate, buildings and improvements thereon; all machinery and other production equipment appurtenant thereto; all production, sales and engineering records relevant to the operation of said plants; and all other facilities and equipment used in the manufacture of CO_2 or dry ice.

(2) The disposal of said plants shall be effected through a trustee or trustees (hereinafter referred to as "The Trustee") appointed by the Court forthwith after entry of this Final Judgment. The term of appointment of The Trustee shall be one year. The Court may extend such term upon a showing that there may be persons who have an interest in purchasing the said plants. The Trustee is to act as an officer of the Court and shall have full powers to bring about the prompt and expeditious disposal of said plants in accordance with the terms and conditions of this subsection (E) of this Section IX of this Final Judgment. The compensation of The Trustee shall be fixed by the Court.

(3) Disposal of said plants shall be at such reasonable prices as shall be determined by the Court, having due regard to a value determination made by an independent appraiser appointed by the Court. In the event that any offer for the purchase of said plants for CO_2 purposes is received which is less than the value determination made

by the said independent appraiser, both plaintiff and defendant Liquid may be heard on the reasonableness of such offer. Disposal of said plants shall be made to a person or persons other than (a) a defendant herein, (b) a stockholder, officer, director, employee, or agent of any defendant herein or (c) any person affiliated, directly or indirectly, with any defendant herein. Disposal of said plants by The Trustee shall be restricted to persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both, and who file with the Court an undertaking so to do.

(4) Defendant Liquid shall take such steps as are necessary to maintain said plants, until the time of disposal thereof by The Trustee, at the defendant's best standards of operating performance applicable to said plants for the manufacture of CO_2 and (in the case of the existing plant located at Indianapolis, Indiana) dry ice. Pending such disposal, defendant Liquid shall not permit said plants to be diminished in capacity or turned to uses other than the manufacture of CO_2 or dry ice. Defendant Liquid shall at all times furnish to The Trustee and prospective purchasers of said plants all information regarding said plants, and permit them to have such access to, and to make such inspection of, said plants as is reasonably necessary. Defendant Liquid shall take all other actions which it is directed by the Court or The Trustee to take in order to disseminate and publicize the availability for sale, and to promote and effectuate the expeditious disposal, of said plants.

(5) During the entire period for which The Trustee serves, and at the end of such period, The Trustee shall render such reports to, and request such instructions from, the Court as may be necessary or appropriate.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 477

THE LIQUID CARBONIC CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the appellee moves that the final order of the district court be affirmed.

This is a direct appeal from the final order entered by the district court on September 20, 1954, granting appellee's motion for an order carrying out the final judgment which the court had entered on March 7, 1952.

In June 1948 appellee filed a civil complaint charging that appellant and others were parties to an illegal conspiracy to restrain and monopolize interstate commerce in the manufacture, sale and distribution of carbon dioxide and dry ice, in violation of Sections 1 and 2 of the Sherman Act, 15

U.S.C. 1, 2. The relief requested included divestiture relief.

After the defendants had filed answers denying the material allegations of the complaint, the court on March 7, 1952, entered a consent judgment which, in addition to granting other relief, provided in Section IX (E)(1) that appellant, within one year from the date of entry of judgment, "shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana * * *." Subsection (E) further provided: Disposal of said plants shall be effected through a trustee appointed by the court for the term of one year, which term the court may extend upon a showing that there may be persons interested in purchasing the plants (par. 2). Disposal shall be at such reasonable prices as the court shall determine, having due regard to a value determination made by an independent appraiser appointed by the court; shall not be to a defendant or to an affiliate, stockholder, officer, director, or employee of a defendant; and shall be restricted to "persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both" (par. 3). Appellant shall maintain the plants, prior to their disposal by the trustee, at its best standards of operating performance applicable to manufacture of carbon dioxide and dry ice (par. 4).

Under Section XIII of the judgment, the court retained jurisdiction for the purpose of enabling

any of the parties to apply to the court at any time for such "further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

A trustee was duly appointed for the term of one year, and his appointment was extended to June 1, 1953, as to the Long Island City plant and to November 2, 1953, as to the Indianapolis plant. The trustee was unable to find an acceptable buyer among the class to which he was restricted and his appointment terminated on November 2, 1953. Shortly thereafter, the United States moved for an order carrying out the court's judgment by directing appellant to dispose of its Indianapolis and Long Island City plants, and for such further orders as the court might deem appropriate or necessary. Following argument of this motion in January 1954, the court on May 4, 1954, rendered an opinion denying the Government's request for an order directing appellant to dispose of its plants but enjoining appellant from producing carbon dioxide or dry ice at either plant. (Juris. Statement 10-15.)

On reargument, which was granted on the plea that appellant had not previously been given opportunity to oppose the relief which the court had granted, the Government requested that injunctive relief should be broadened to prohibit use of the two plants in question for storage or distribu-

tion of carbon dioxide or dry ice. The court in its opinion of September 2, 1954, adhered to its prior decision, but held that, in order to grant adequate relief, appellant should be enjoined from using its plants for the production, storage or distribution of carbon dioxide or dry ice. (Juris. Statement 16-20.) The appeal is from the order of the court so providing.

The various questions presented by the jurisdictional statement all turn on the question of whether the consent decree, correctly interpreted, required appellant to dispose of its Long Island City and Indianapolis plants in the event that the court-appointed trustee could not effect sale to purchasers who would operate the plants for the production of carbon dioxide and dry ice. Certainly if the decree requires such disposal, appellant cannot complain because the court, instead of directly ordering sale of the two plants, limited appellant's use of them, thereby providing strong inducement for sale but leaving appellant free to determine the time and terms of sale of each plant.

In this case, where the district judge had participated in the conferences which eventuated in the consent decree,* his interpretation of the decree is entitled to great weight. The district judge de-

* On oral argument of the Government's motion for an order to carry out the consent decree, the district judge stated: "I participated in the conferences leading up to the consent decree, as you know, over a period of many, many months." Transcript of hearing of January 18, 1954, p. 39, which transcript is part of the record in this Court (see item (8) of Part II of appellant's notice of appeal).

clared that appellant's interpretation of the decree—that it permitted appellant to continue production of carbon dioxide and dry ice at the plants in question, provided their divestiture could not be accomplished through the medium of the trustee under the terms specified in Section IX (E) of the decree,—"would do violence to the intent of the final judgment herein" (Juris. Statement 14). The district judge further said that this interpretation would "tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless" (*id.*, at 15).

The district court noted that an affidavit submitted by appellant's president in opposition to the Government's motion for an order directing appellant to dispose of its Long Island City and Indianapolis plants showed that it was appellant's "understanding that the effect of the decree would be to proscribe further production activities at the plants in question" (Juris. Statement 14). The court also observed that "the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto" (*ibid.*).

In *Chrysler Corporation* v. *United States*, 316 U.S. 556, where, as here, the consent decree noted that the court would retain jurisdiction for the purpose of enabling any party to apply for such further orders "as may be necessary or appropriate" for the "construction or carrying out" or

"modification" of the decree, this Court upheld an order of the district court modifying a particular provision of the judgment. The Court said (p. 562) that the question on appeal was whether the change made by the district court "amounted to an abuse of this power to modify" and that "the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree."

We submit that in the present case the order entered by the district court clearly was not an "abuse" of its reserved power to modify and that its order "served to effectuate" the basic purpose of the original decree. As found by the court below, the purposes of the divestiture provisions of the decree were two-fold: (1) to divest appellant of the plants in question and (2) to procure their sale to persons who would operate them in competition with appellant (Juris. Statement 13). As the court said, these purposes, if accomplished, "would not only have reduced the monopolistic power and influence of Liquid [appellant] charged in the complaint but would also have provided added competition" (*ibid.*). But the two purposes, although related, are severable. Failure to secure the contemplated "added competition" is not a reason to fail to effectuate the intended divestiture, thereby limiting *pro tanto* appellant's power to monopolize and restrain trade.

Appellant urges, as it did in the court below, that the district court's order is invalid under the principles applied in *Hughes* v. *United States*, 342 U.S.

353. In that case a consent decree required a motion picture company (R.K.O.) to transfer its production and distribution business to a newly created company and its exhibition business to another new company, and to dissolve after transferring the stock of the two new companies pro rata to its own stockholders. Howard R. Hughes, who owned 24% of R.K.O.'s stock, consented to a section of the decree providing that he either sell his stock in one of the two new companies or deposit his stock in one of them under a voting trust agreement to remain in force until he had sold the deposited stock. Some time after he had made such a deposit the district court entered an order directing the trustee to sell the deposited stock failing prior sale by Hughes. This Court held that the decree gave Hughes a choice between sale of his stock and retention of a mere beneficial interest, and that it was therefore improper to eliminate one of these alternatives without an affirmative showing, based on evidence, of the need for supplementary relief with respect to the trusteed stock.

We have previously indicated that in the instant case there is reasonable basis for the interpretation which the district court placed on the consent decree—that competitors are to be given the opportunity to purchase two of appellant's plants, but that the decree in any event bars continued operation of these plants in appellant's carbon dioxide and dry ice business. Under this interpretation, the district court's order implements, rather than

expands, the obligations of the decree, and its order does not conflict with the decision of this Court in *Hughes*.

For the foregoing reasons, we submit that the appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY 1955.

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HAROLD B. WILLEY, Clerk

IN THE

United States Supreme Court

OCTOBER TERM, 1954,

No. [redacted] 25

THE LIQUID CARBONIC CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Appellee has moved to affirm the final order of September 2, 1954. It does not assert lack of jurisdiction or nonconformity with statutes or rules. Its sole insistence is that no substantial question is presented in that the "questions presented * * * all turn on the question of whether the consent decree, correctly interpreted, required appellant to dispose of its * * * plants in the event that the court-appointed trustee could not effect sale to purchasers who would operate the plants for the production of carbon dioxide and dry ice" (Motion to Affirm, p. 4).

Appellee then assumes that the consent decree, if "correctly interpreted," answers those questions in the affirmative,[1] and on this premise asserts that "appellant cannot complain because the court * * *[2] limited appel-

[1] Yet the District Court denied appellee's motion for an order compelling appellant to sell its plants.

[2] Without taking any evidence or making or having any basis for findings and conclusions, and without even considering the allegations of the complaint, or the complaint in any way, except "what its ultimate objective was" (Minutes, June 9, 1954, Hearing, p. 19).

lant's" use of its plants (*Idem*); it concludes "that the appeal presents no substantial question" (p. 8).

The Jurisdictional Statement demonstrates that the issues involved cannot be so disposed of (Juris. St., 4-9). Even were the question only one of interpretation, the issue would still be a substantial one.

The clear and unmistakable language of the consent decree, however, requires no construction or interpretation; it fully sets forth the one and only basis upon which the appellant agreed to sell its plants or surrender its use of them. On the conditions there stated and on those alone was the appellant's consent secured. "The parties and the District Court provided their own detailed plan to neutralize the evils." (*U. S.* v. *Hughes*, 342 U. S. at 352.) Conceding, *arguendo*, that the Court, in certain circumstances, has power to grant relief other than that agreed upon, such power could only be exercised in accordance with the dictates of due process—hearings, evidence and findings.

The questions presented are, we submit, fundamental and substantial.

The provisions of Section IX(E) of the consent decree, reprinted at page 21, *et seq.*, of the Jurisdictional Statement, contains the *only* language dealing with the disposition of appellant's plants. This is summarized at page 8 of the Statement and need not be repeated here.

There is no general consent to divestiture, nor is there any ambiguity or uncertainty in the decree's provisions; they fully and carefully project a complete plan for making the two plants available to the use of competitors upon conditions there stated. Each and all of the obligations and duties undertaken by, or imposed upon, appellant in the decree were fully and faithfully performed and carried out within the time specified and extensions thereof. *There is and can be no claim to the contrary.*

It may aptly be noted, though we submit it is unnecessary to the present argument, that there is not here presented a situation where "changing conduct or conditions" require continuing supervision, and thus permit "adaptation [of the consent decree] as events may shape the need" (*U. S.* v. *Swift & Co.*, 286 U. S. 106, at p. 114). It nowhere appears that after the decree was consented to and approved, there was any change in the number or circumstances of persons available "who intend to operate said plants in the manufacture of CO_2 or dry ice or both", and were thus qualified to become purchasers under the decree (Jur. St., p. 22). The situation was one which existed when the decree took effect, and continued as it then was.[1] But even were it otherwise, "nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead [the court] to change what was decreed * * * with the consent of all concerned" (*Swift & Co.* case *supra*, at p. 119).

It would seem axiomatic that such showing could be made only by evidence followed by findings. Such was the holding of this Court in *Hughes* v. *United States*, 342 U. S. 343. The refusal of the district court in the instant case to follow the decision in that case in itself presents a serious and substantial question concerning the application of the doctrine stated therein.

---

[1] Indeed, counsel for appellant on the argument below (Minutes, June 9, 1954, Hearing, pp. 4-5) specifically called the Court's attention to the fact that in the negotiations for the consent decree, defendant's counsel had continuously urged "that the Government's contention that the plants would be purchased by a CO_2 purchaser was without foundation," and that appellant's consent to the limited sales provision of the decree did not constitute a change in those views. His recital of what had then happened was not challenged by the Court or the Government. Accordingly, it is clear that the possibility that there would be no sale was present and considered when the consent decree was formulated, and that no one desired, consented to, or sought any alternative provision.

There is no valid ground upon which the *Hughes* case and the case at bar may be distinguished. References by the district court in its decision (Juris. St., pp. 12, 19) and by the appellee in the Motion to Affirm (pp. 6-7) to the "choice" given to Mr. Hughes in selecting one of two alternative methods for disposing of his stock do not indicate any circumstance which renders the decision inapposite. Once Mr. Hughes made his choice, the method he selected became the *only* method of divestiture consented to by him and authorized by the decree.

The earlier decision in *United States* v. *International Harvester Co.*, 274 U. S. 693, had likewise held that a modification of a consent decree must depend upon competent testimony "subject to the test of cross-examination" and that any "construction" of the decree must not be "repugnant to the agreement approved by the court and embodied in the decree which has become binding upon all parties and upon which the [appellant] has, in the exercise of good faith, been entitled to rely" (274 U. S., at p. 703).

The foregoing requirements are not obviated by any reservation of power in the decree. In the *Hughes* case, *supra,* the Government relied upon a similar reservation as well as the inherent equity powers of the court (342 U. S., at p. 353). Nevertheless, this Court held, as stated above, that the power to amend or modify had been abused. The "burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated" is upon the Government which seeks such relief (*Ford Motor Co.* v. *United States,* 335 U. S. 303, at p. 322). As previously noted, that burden requires a showing that there is no repugnancy to the agreement which was contained in the decree; in all its phases it can be met only by competent evidence and findings which are justified thereby.

What the court has done here violates not only the terms of the decree but also the spirit of the anti-trust laws. An injunction against the use of appellant's plants, particularly in the case of the Indianapolis plant, means that the community has been deprived of the sole source of domestic production of CO_2 and that appellant's chief competitor, co-defendant Pure Carbonic Company, has been given an opportunity to monopolize the sale of CO_2 in the Indianapolis area.[1]

The foregoing suffices, without present discussion of the other questions set forth in the Jurisdictional Statement (p. 3), to establish that the questions presented by the appellant on this appeal are not within the language of the Rules of this Court, "so unsubstantial as not to need further argument," but are material and of moment.

Appellee's motion to affirm should, accordingly, be denied, and probable jurisdiction should be noted.

Respectfully submitted,

JAMES F. DWYER,
Attorney for Appellant.

Dated: January 25, 1955.

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[1] Affidavit of W. A. Brown, Jr. [Item (7) Notice of Appeal.]

FILED
AUG 17 1955
HAROLD B. WILLEY, Clerk

IN THE

United States Supreme Court

OCTOBER TERM, 1954.

No. [redacted]25

THE LIQUID CARBONIC CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF ON THE MERITS.

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IN THE

United States Supreme Court

OCTOBER TERM, 1954.

No. 477.

THE LIQUID CARBONIC CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF ON THE MERITS.

Appeal from a final order (R 96) of the United States District Court for the Southern District of New York (RAYFIEL, D. J.), which modified a final decree (R 73) entered on consent in an action brought pursuant to Section 4 of the Act of Congress of July 2, 1890 (C. 647, 26 Stat. 209; 15 USC §4) for alleged violations of Sections 1 and 2 of said Act (*id.* 15 USC §§1, 2). The final order enjoined appellant from producing, storing or distributing carbon dioxide and dry ice at its plants in Long Island City, New York[1] and Indianapolis, Indiana.

[1] Subsequent to the entry of this Court's order of February 14, 1955, noting probable jurisdiction, appellant's Long Island City plant was sold and any question involving a disposition of said plant is, therefore, moot.

The Opinions Below.

No opinion was delivered upon the rendering of the consent decree (R 73).

Thereafter appellee moved for an order "carrying out said judgment" as ordered therein "by directing [appellant] to dispose of said plants" [though the notice of motion admitted that there could be no sale in the manner provided for in the consent decree] (R 107).

This motion was "denied, without prejudice to a renewal thereof upon a proper showing of good cause" but, with the mandate that "Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice" (R 103). The opinion, dated May 4, 1954 (R 98) is reported in 121 F. Supp. 141. No order was entered on that decision.

Reargument was thereafter granted on appellant's motion (R 111) on the ground that the matter of injunctive restrictions "was not submitted to the Court at the hearing" (R 104-5). After reargument the District Court rendered the opinion, adhering to its previous one, and broadening the injunction (see p. 7, *infra*), reported in 123 F. Supp. 653. The final order (R 96) from which this appeal was taken was entered September 20, 1954. No separate findings of fact or conclusions of law have been made by the Court below.

No opinions except those noted above, have been rendered in this cause (there has been no companion case) to which reference is necessary on this appeal.

Jurisdictional Grounds.

Appellant has invoked the Court's jurisdiction upon the following grounds:

(i) The action, in which the final order appealed from was entered, was instituted by the appellee against appel-

lant and three other corporations to prevent and restrain alleged violations of Sections 1 and 2 of the Act of July 2, 1890 (15 U. S. C., §§1 and 2), in pursuance of Section 4 of the Act of Congress of July 2, 1890 (Title 15, U. S. C., §4, C. 647, 26 Stat. 209).

(ii) This appeal is from a final order entered below on September 20, 1954, on motion of the appellee, and over the opposition of the appellant, modifying and enlarging upon the final judgment herein which had been entered on consent on March 7, 1952. No order respecting a rehearing of the order appealed from has been made. Notice of Appeal to this Court was served and filed in the United States District Court for the Eastern District of New York on October 27, 1954.

(iii) Appellant believes that the provisions which confer on this Court jurisdiction of this Appeal are found in Title 15 U. S. C., §29 (Feb. 11, 1903, c. 544, §2, 32 Stat. 823; Mar. 3, 1911, c. 231, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, §17, 62 Stat. 989).

(iv) Cases which appellant believes sustain this Court's jurisdiction of this appeal are:

Hughes v. *United States,* 342 U. S. 353;
Missouri-Kansas Pipe Line Co. v. *United States,* 312 U. S. 502;
Swift & Company v. *United States,* 276 U. S. 311.

In its order of February 14, 1955, this Court noted probable jurisdiction and placed this cause on its summary calendar.

Statutory Provisions.

No statutory provision, treaty or regulation is directly involved in this case. However, the 5th Amendment to the United States Constitution[2] is directly involved, in that the District Court's order prohibiting the appellant from the use of its two plants, was made without a hearing, or taking testimony, and over appellant's protests and thereby deprived appellant of its property without due process of law.

The consent decree upon which the District Court sought to base its order, was entered "without trial or adjudication of any issue of fact or law" and upon appellant's answer "denying the substantial allegations" of the complaint (R 60). There is and can be no claim that appellant's consent constituted an admission of the factual allegations or legal conclusions contained in the complaint or that such allegations or conclusions have any bearing on the final decree or the modification thereof. Accordingly, the order cannot be justified on any basis that appellant has violated the Sherman Act, 15 USC §1, *et seq.*

The Questions Presented.

The questions presented for review on this appeal are as follows:

1. Whether the District Court erred in enjoining appellant from producing, storing or distributing carbon dioxide and dry ice or either of them, at its plants at Long Island City, New York [see Note (1), *supra*] and Indianapolis, Indiana.

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(2) "• • • nor shall any person • • • be deprived of life, liberty, or property without due process of law • • •" (U. S. Const., Amend. V).

2. Whether the District Court had the power, without holding any hearing, taking any testimony or making any findings, to make the order appealed from granting injunctive relief.

3. Whether the District Court in making the order appealed from exceeded the jurisdiction reserved in the consent decree.

4. Whether the order entered herein, without appellant's consent and without a hearing or findings and enjoining the use of appellant's property, deprives appellant of its property without due process of law or constitutes confiscation thereof.

5. Whether, in any event, the District Court could properly have set aside or opened the consent decree and make the order now under appeal.

Statement of Case.

The complaint (R 46) charges that appellant and others engaged in an illegal combination and conspiracy to restrain trade and monopolize interstate commerce in connection with the manufacture, distribution and sale of carbon dioxide and dry ice (R 50). The appellant, and each other defendant, filed an answer (R 60) denying all the material allegations of the complaint. Thereafter, and without a trial or hearing, final judgment was entered on March 7, 1952, on the consent of appellant, the appellee and all other defendants (R 95). The terms of said decree have, appellant submits, been fully complied with. Appellee, however, maintains, and has, in part, been sustained by the District Court in the order appealed from (R 96), that the conditions under which appellant was to dispose of certain of its

plants may be ignored and that appellant may be forced to rid itself of said plants or the use thereof in a manner and for a purpose not provided for by the consent decree.

Under the terms of subsections (1) to (5) of Section IX (E) of the consent decree (R 83-4) appellant was required, within one year from the date of the decree, to sell two of its plants located respectively at Long Island City, New York, and Indianapolis, Indiana, but subject to the terms and conditions there set forth, viz; the plants were to be disposed of "as complete units," and as going concerns; the sale was to be made only to persons who intended and undertook to operate the plants for the manufacture of the same products (that is, competitors or potential competitors of appellant); the sale was to be made within one year, or an extended period if it should appear that "there may be persons who have an interest in purchasing the said plants," by a trustee, acting as an officer of the Court, and at a price to be "determined by the Court, having due regard" to appraised value thereof (R 83). In the interim, pending such sale, appellant was required to maintain and operate said plants at full capacity (R 84).

Appellant did *not* consent, and the decree did *not* provide that the plants should be *otherwise sold or their use discontinued.* The disposal of the plants and the consequent discontinuance of their use by appellant were expressly made contingent upon the conditions outlined above.

A trustee was appointed and efforts were made to procure a purchaser meeting the requirements set forth in the decree during the initial period of one year, as extended. The trustee's inability to dispose of the plants in the manner prescribed having been conceded, his appointment was terminated in all respects on November 2, 1953 (R 99).

Thereafter, and by notice of motion filed December 28, 1953, (R 107) the appellee moved, purportedly under the District Court's reservation of jurisdiction (Section XIII of the final judgment—R 90),[3] for an order "carrying out said judgment" by directing appellant "to dispose of said plants as ordered and directed by Section IX(E)(1) of said final judgment," and for other, unspecified relief (R 108).[4]

After argument of the motion, the District Court held:

> "The Government's [appellee's] motion for an order directing Liquid [appellant] to dispose of the Long Island City and Indianapolis plants is denied, without prejudice to a renewal thereof upon a proper showing of good cause therefor, and Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice" (R 103).

Thereafter appellant moved for reargument (R 111) and after reargument, the District Court not only adhered to its original decision in all respects but further enlarged the injunctive relief against appellant so as to enjoin appellant not only "from using the Long Island City and Indianapolis plants for the production," but also for the "storage or distribution of carbon dioxide and/or dry ice" (R 106).[4]

In short, appellant was deprived of any possible gainful use of these plants in its business, the business conducted

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[3] "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

[4] The government did not seek an injunction restraining appellant's use of the plants. Indeed, its counsel informed the Court, which *sua sponte* raised the question, that an injunction might constitute a modification of the consent decree (R 5, 6).

there was to be destroyed, and the sales value of the plants reduced to a minimum, all over the opposition of the appellant and in the absence of proof that appellant had violated any law.

Summary of Argument.

Appellant's argument set forth herein may be summarized as follows:

The consent decree contains no provision for, or consent to enjoining appellant's use of its plants. No such provision may properly be engrafted onto the decree by interpretation of appellant's consent to limited divestiture. An enlargement of the decree to encompass the injunctive relief constitutes a substantial modification of the decree. The order like the consent decree was entered "without trial or adjudication of any issue of fact," without the introduction of any evidence and without making findings with respect thereto, and despite the express limitations upon appellant's consent to particular relief only (R 73). Its effect, in denying any use of the plants to the appellant in its business was completely to change the nature and object of the relief (a) from a sale of a going plant for use by a competitor to the sale of an abandoned plant to anyone who would take it, (b) from a sale at a reasonable value to an indirectly forced sale at a sacrifice price, (c) and from a sale that might be expected to increase competition to an abandonment of business by appellant, which would have the effect of lessening competition in the areas affected. Neither the District Court's reserved power nor its inherent power can supply jurisdiction for the compulsory prohibition thrust upon appellant. The relief granted below, therefore, deprives appellant of the use of its plants without due process of law.

ARGUMENT.

The entry of the injunctive order was unwarranted by the provisions of the final decree or by any interpretation thereof.

The final decree below entered on the consent of the parties (R 73) contains no express provision prohibiting appellant's full use of its plants. Indeed, the contrary appears in Section IX(E)(4) (R 84), wherein it is provided that appellant "shall take such steps as are necessary to maintain said plants, until the time of disposal thereof by the Trustee, at the defendant's (appellant's) best standards of operating performance applicable to said plants for the manufacture of CO_2 and (in the case of the existing plant located at Indianapolis, Indiana) dry ice. Pending such disposal, defendant Liquid shall not permit said plants to be diminished in capacity or turned to uses other than the manufacture of CO_2 or dry ice."

Attention is directed to the precise limitations contained in the foregoing provision respecting disposal of the plants, as confined to "disposal thereof by the Trustee * * *." There is no claim that the Trustee still functions or that the period within which he was to effect a sale has not fully expired. His efforts to sell in accordance with the consent decree had established that there was no competition, present or potential, that would be fostered by a sale of the plants. Accordingly, support for full divestiture by sale of the plants or partial divestiture by a compulsory prohibition against their use, must be found—if it exist at all—elsewhere in Section IX of the decree, which contains the *only* provisions that discuss in any manner the two plants under consideration here.

Section (E) in addition to the provisions of subsection (4) just discussed, has four other subsections. (R 83-84.) Of these, subsection (5) has no possible bearing on this dispute. Subsection (1) contains specific reference to the one year limitation referred to above, i.e., "within one year from the date of entry of this Final Judgment, defendant Liquid shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana." Further reference to the one year period is contained in subsection (2), which introduces the sale by Trustee concept, thus, "disposal of said plants shall be effected through a trustee or trustees (hereinafter referred to as 'The Trustee') appointed by the Court forthwith after entry of this Final Judgment. The term of appointment of The Trustee shall be one year. The Court may extend such term upon a showing that there may be persons who have an interest in purchasing the said plants. The Trustee * * * shall have full powers to bring about the prompt and expeditious disposal of said plants in accordance with the terms and conditions of this subsection (E) * * *."[5] Subsection (3) contains provisions for an appraisal of the plants by a Court appointee, to assure appellant a fair return on divestiture by sale and also contains restrictions respecting the prospective purchasers, i.e., "disposal of said plants by The Trustee shall be restricted to persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both, and who file

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[5] Clearly it was within the contemplation of the parties in consenting to the decree that such limited period should suffice to demonstrate whether there *were* any persons in the competitive field who "have an interest in purchasing" the plants under the terms of the decree.

with the court an undertaking so to do."[6] As stated at the outset, there is no divestiture provision in Section IX(E)(1) through (5) (R 83-84) which does not limit divestiture, first, to a period of time, namely, one year from the entry of the decree, (sub. 1), secondly, to disposition during such period, unless extended for good cause, by a court appointed Trustee, (sub. 2), thirdly, to disposition at a price based on a value fixed by a court appointed appraiser (sub. 3) and finally, to persons meeting the specific qualifications, namely, those having an established intent to operate the plants in the manufacture of CO_2 or dry ice or both (sub. 3).

Express provisions prohibiting appellant from operating its plants being lacking, it remains to be seen whether any such provision is present by construction or interpretation. The decree itself, as pointed out above, expressly required continuance of the plants at appellant's "best standards" (sub. 4; R 84). Careful reading of the language contained in Section (E) leaves nothing to the imagination or to interpretation. The language is succinct, clear and direct. A more carefully prepared scheme for the accomplishment of divestiture within its framework could hardly be envisioned. No ambiguous phrases, no incompleted concepts, no difficult passages are encountered. On the contrary there is every evidence that the minds of appellant and appellee met with the concurrence of the District Court on formulation of a plan designed to effect an increase in competition, which appellee considered to be desirable, by sale to a competitor within the period and in the manner specifically provided in the section; nothing else was con-

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[6] Yet, now the District Court has in effect changed this as though it read "disposal of said plants shall be made by the appellant to anyone who wants them for any purpose or at any price, or said plants shall be permitted to stand idle and vacant."

templated or desired by the parties.[7] Accordingly, resort by the District Court (R 102) to the allegations, charges and "general purpose" and "objectives" of the complaint —all of the allegations of which were expressly denied by appellant—was unnecessary and improper. The consent decree was not, nor could it be, determinative of any issue. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322; decided June 6, 1955.

"[T]he parties and the District Court provided their own detailed plan * * *" (*Hughes* v. *U. S.*, 342 U. S. at 357) in the consent decree, and it now remains to be seen whether changes therein could be made in disregard of the requirement of due process, i.e., hearings, evidence and findings, absence of which has been specifically condemned by this Court in *Hughes* v. *U. S., supra.*

The injunctive order materially changes the consent decree and violates the guaranty of due process.

The District Court did not take testimony or hold hearings when the consent decree was made (R 18) nor upon the entry of the modification order. This alone, under the doctrine of *U. S.* v. *Hughes, supra,* would be a sufficient defect on which to strike the order. The discussions before the Court at or prior to the entry of the consent decree and the argument and re-argument of the motion resulting in the order appealed from (R 3-45) cannot and do not constitute a substitute for the "substantial evidence" prescribed in *U. S.* v. *International Harvester Co.* (274 U. S. 693 at p. 703), where it was held that anything short of common law proof "violates the fundamental rules of evidence

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[7] Appellee contended at and before entry of decree that the plants would be purchased by a CO_2 producer. That contention was vigorously disputed by appellant which, however, was willing to test by trial the truth of the government's assertion (R 15).

entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination" (p. 703).

Concededly, no attempt was made by the District Court at any time to comply with the foregoing rule. The consent decree itself (R 73) expressly states that it was entered "before the taking of any testimony and without trial and adjudication of any issue of fact or law • • •." No testimony or other proof was or could have been properly produced thereat, since the litigation has been disposed of *on consent* and not *by contest.* Indeed, no evidence was at any time produced (R 18).

Despite the Court's statement that findings had not been made and that the allegations of the complaint were denied by appellant (R 102), the Court below purported to *determine* the "general purpose" of the complaint (denied *in toto* by appellant) and stated:

> • • • "While there were no findings of fact, and the chief substantive allegations of the complaint were denied by the defendants, nevertheless the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto" • • • (R 102).

Once the fundamental concept that appellant conceded nothing contained in the complaint—including its "general purpose"—or in the final decree *not expressly and carefully* set forth therein as consented to, was lost sight of, the Court proceeded to adjudicate—without findings or any hearing or taking any proof—the new relief it said to be appropriate, in these words:

> "Of what avail would the decree herein, so far as it applies to the Long Island City and Indianapolis plants, be if its effectiveness depended on such a fortuitous circumstance as the success of the Court-appointed Trustee in effecting the sale thereof within the moderate period of time and under the somewhat restricted terms and conditions provided in the decree? Such a holding would be unrealistic, repugnant to the very purpose of the anti-trust statutes, and tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless" (R 102).

The foregoing quotations clearly reveal the error into which the District Court fell when it became unmindful of the nature and extent of the consent decree and sought to rewrite that decree over the protest of the appellant.

Accordingly, the Court below duplicated the error which this Court, in *U. S.* v. *International Building Co.*, 345 U. S. 502, condemned in these words:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place*, 94 U. S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by the court. They may or may not have been agreed upon by the parties. Perhaps as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration" (p. 505).

The consent decree, although made without findings or testimony, was and is, *res judicata* between appellee and appellant under familiar principles. It bars a new suit upon the same cause of action, or upon claims which arose prior to the judgment and which could have been sued on in the same suit. *Lawlor* v. *National Screen Services Corp., supra,* 349 U. S. 322; *U. S.* v. *International Building Co., supra.* On the other hand, it does not constitute a finding on any issue,— "such as the legality of the exclusive license agreements or their effect on petitioners' business" (in *Lawlor's* case) or the violation by appellant of the anti-monopoly laws (in this case), which might arise in connection with another cause of action. Clearly the Government could not have obtained the relief granted by the order appealed from in a new action; there is no pretense of any subsequent or new anti-trust violation *(ibid).* Likewise there is no claim of any fraud or other ground for setting aside the consent decree, nor did the court attempt to do so. Yet the District Court has attempted to compel divestiture, beyond and outside of the consent of the parties and of the judgment entered thereon, though there has not been, and cannot now be, any determination that appellant has violated the anti-monopoly laws in the respects set forth in the complaint herein. Manifestly, in the absence of such determination compulsory divestiture is improper.

Once a consent decree is entered, the power to modify or change it—even if disguised under an attempted "interpretation"—must not only be based upon a hearing, and common law proof, but in no event can there be a substantial variation in the *quantum* or nature of the relief covered by the consent. These requirements are not avoided by a reservation of power or jurisdiction over the parties in such a decree. (*Hughes* v. *U. S., supra.*)

In the *Hughes* case, the Government relied upon a similar reservation as well as upon the inherent power of the Court (342 U. S. 353). Nevertheless, this Court held that the attempted modification was erroneous and an abuse of any inherent power in the Court.

Even where changing circumstances are alleged to require a modification of a consent decree (*cf. U. S.* v. *Swift & Co.*, 286 U. S. 106; at p. 114), the "burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated, • • • " is upon the Government which seeks such relief. *Ford Motor Co.* v. *U. S.*, 335 U. S. 303, at page 322. No serious contention can be made that appellee here made any showing of changed conditions or sustained the burden of common law proof required to effect a modification of the decree. Indeed, it is apparent that there has been no change in conditions since the consent decree was entered; the possible lack of buyers was within the contemplation of the parties [see Note (7) *supra*]. The Government was then willing to risk the chance that no sale, as agreed upon, could be made; the appellant was ready to take the chance that it could. Both obviously realized that if such a sale were not possible, there was no reason for appellant's disposing of its property.

There is [the District Court to the contrary notwithstanding (R 100)] no escape in the present case from the force of this Court's holding in the *Hughes* case, *supra*. There, as here, a divestiture such as provided for by consent decree was desired on the one hand and consented to on the other. In the *Hughes* case, it was agreed that Mr. Hughes should have the right to select one of two methods of divestiture, i.e., to dispose of any control over his stock (a) by sale, or (b) by deposit of the stock with a court-designated voting trustee (342 U. S. at 355). After Mr.

Hughes selected the latter method (deposit with the voting trustee until sale), the Government sought to compel Mr. Hughes to sell his stock. Without evidence or findings of fact, and over Hughes' protest, the District Court directed Mr. Hughes in summary fashion to sell his stock. This Court held that was error (342 U. S. at 358).

In the case at bar, the Government and appellant agreed upon a method by which it might be ascertained whether there was any potential competition which was impeded by existing conditions, and, if so, the means by which the freedom of competition might be increased, namely, a limited form of divestiture by a sale within a fixed period which could be enlarged if there were any possibility of a sale as there provided by a court appointed trustee at a reasonable price to a person who would qualify as a carbon dioxide producer. [Final Decree, Sec. IX; (R 83-84)].

The holding of the *Hughes* case applies *a fortiori* to the present one. There, it was agreed that in all events there should be a divestiture. Here, the agreement was that there should be a divestiture *only* in case certain conditions were complied with.

In the Court below, as in the *Hughes* case, the Government sought to force upon appellant a sale of its property in violation of its solemn agreement contained in the consent decree; here, any disposition of appellant's plants was limited as to time and adequacy of price, and was to be made only if a purchaser was found with the enumerated qualifications which would tend to enlarge competition. The District Court did not grant the entire relief requested by the Government, but it did prohibit appellant from in any way using its plants in its business (R 97-98). Thus, in effect, the District Court accomplished an even more stringent result than that produced in the *Hughes* case as indicated in the foregoing. In both there was an

enforced deprivation of property without consent, without evidence or findings of fact and over appellant's protest. In disapproving the action of the lower court in the *Hughes* case, this Court said:

> • • • "the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V. The District Court's order cannot be supported by reliance on such an interpretation. Consequently the court's command to sell the stock effected a substantial modification of the original decree" (p. 357).

This Court then concluded:

> • • • "Neither when the present order was considered nor when the original decree was entered were any findings of fact made to support an order of compulsory sale of Hughes' stock. As previously pointed out the consent of Hughes did not include consent to make him sell. At every stage Hughes objected to the order forcing sale of his stock without a hearing that included evidence and a judicial determination based on it.
>
> "In these circumstances we hold that it was error to enter an order forcing Hughes to sell his stock" (pp. 357-8).

Some years ago, when the question of the power and propriety involved in a district court's modification of a consent decree in an antitrust case was before it, this Court said that a modification of a consent decree so as to require the division of the International Harvester Company into separate corporations—on the ground that,

although the consent decree did not specifically so provide, certain later developments required such conclusion in order to render effective the broad objectives of the decree—

> "would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely" (*U. S.* v. *International Harvester Co., supra,* 274 U. S. 693 at p. 703).

Here there have been no later developments but simply a demonstration that there were and are no competitors or potential competitors willing and able to purchase appellant's plants.

It is axiomatic that if appellant was to be bound by its consent to a conditional and limited divestiture (as it was) that the Government must also be bound by its agreement thereto. It was obviously apparent to the District Judge that any compulsory sale under guise of enforcing the consent decree would violate appellant's constitutional rights. It was sought to avoid this by granting injunctive relief.

The consent to a partial divestiture was predicated upon and limited to the contingency that a competitor be found to purchase the property—an event which appellant had warned would not materialize, but on which the Government was prepared to take a chance (R 15). That was what the consent decree provided. The Government cannot now be heard to assert that, the condition precedent to any sale having failed, as appellant had warned it would, the court may, nevertheless, compel divestiture of a type and in a manner never contemplated. Constitutionally, the injunctive relief is equally objectionable and no less a deprivation of property without due process.

Having wisely or unwisely renounced such other rights of enforcement as it might have gained through successful litigation, the Government may not be heard to complain that the lesser remedy it acquired by consent is unsatisfactory. (Cf. *U. S.* v. *Swift & Co.*, 286 U. S. 106 at 119). What was solemnly adjudged as a final composition of this litigation may not be lightly undone at the Government's caprice. (*U. S.* v. *Swift & Co., idem* at p. 120).

The District Court erred in acting without due process. It cannot, in any event, or by further proceedings, set aside or open the consent decree, and make a new or different decree such as the Government sought and the Court in effect granted by the order now under appeal.

Conclusion.

The order of September 20, 1954, should be reversed and appellee's motion denied in all respects.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 25

THE LIQUID CARBONIC CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion accompanied the antitrust consent judgment (R. 73-96) entered against appellant.[1] The two district court opinions (R. 98-103, 103-107) following argument and reargument of the Government's motion for an order "carrying out said judgment" against appellant are reported in 121 F. Supp. 141 and 123 F. Supp. 653.

[1] That judgment also ran against three other firms engaged in the same business as appellant, Air Reduction, Pure Carbonic and Wyandotte Chemicals.

JURISDICTION

The district court order from which this appeal is taken was entered on September 20, 1954 (R. 96). The notice of appeal was filed on October 27, 1954 (R. 112), and probable jurisdiction was noted on February 14, 1955 (R. 114). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 15 U.S.C. 29.

QUESTION PRESENTED

An antitrust consent judgment required appellant (a manufacturer of carbon dioxide and dry ice charged with monopolization and various restraints of trade) to dispose of two of its plants. One condition specified was that disposition should be made to prospective competitors. The judgment also provided that jurisdiction "is retained" to enter any further orders "necessary or appropriate for the construction or carrying out" of the judgment. Appellant was unable to sell the plants to other carbon dioxide or dry ice manufacturers. Shortly thereafter, the court, on the Government's motion, enjoined appellant from using the plants for the production, storage or distribution of carbon dioxide and/or dry ice, but left it free to use the plants for other purposes or to sell them. On this appeal from that order, the following questions are presented:

1. Whether, under all of the relevant circumstances, the district court reasonably interpreted

its judgment as having the overriding purpose of accomplishing divestiture of the plants.

2. If so, whether the order under review was a "necessary or appropriate" means of effectuating that purpose.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 4, known as the Sherman Act, provides in part as follows:

> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

On June 24, 1948, the United States filed a complaint (R. 46-59) charging that appellant and its principal competitors had violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and monopolize, by attempting to monopolize, and by monopolizing interstate commerce in carbon dioxide ("CO_2") and dry ice. The complaint alleged, among other things, that in 1928 appellant began a program "to eliminate competing manufacturers and distributors of CO_2 and dry ice by acquiring their assets, plants and prop-

erties * * * " (par. 12, R. 49). Appellant's answer (R. 60-70), though denying any antitrust violation, admitted acquisition of 17 producers and distributors of CO_2 or dry ice (who had properties in more than 16 cities, R. 63-64). The result, as the Government alleged and appellant admitted, was that appellant and Pure Carbonic, Inc. ("Pure"), named as a co-conspirator, were "the only companies in the United States having nationwide distribution of both CO_2 and dry ice" (R. 60).

On March 7, 1952, the district court entered a consent judgment against all of the defendants (R. 73-96). The judgment, in addition to granting other relief,[2] provided in Section IX (E) for divestiture of two of appellant's plants. Section IX (E) (1) provided that appellant, within one year from the date of entry of judgment, "shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana * * *" (R. 83). IX (E) (2) provided that "disposal of said plants shall be effected through a trustee" appointed by the court for one year, and that the trustee's term might be extended "upon a showing that there may be persons interested in purchasing the said plants" (*ibid*). IX(E)(3) requires that disposal shall

[2] The judgment enjoined appellant from a number of restrictive practices (R. 76), prohibited it from acquiring any interest in any other CO_2 or dry ice producer or distributor in which any other defendant has any financial interest (R. 76-77), and required it, under some circumstances, to sell uncommitted CO_2 to all qualified distributors (R. 78-80).

be at such reasonable prices as the court shall determine and shall be restricted to "persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both" (R. 83-84). IX(E)(4) requires appellant to maintain the plants, pending disposal by the trustee, at appellant's "best standards of operating performance applicable to said plants for the manufacture of CO_2 and * * * dry ice" (R. 84). Finally, under Section XIII, the court retained jurisdiction for the purpose of enabling any of the parties to apply to the court "at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof" (R. 90-91).

In March 1952, a trustee was appointed for one year. His term was subsequently extended to June 1, 1953, as to the Long Island plant, and to November 3, 1953, as to the Indianapolis plant (R. 99). However, no purchaser offering a reasonable price and planning to use the plants for CO_2 or dry ice purposes was found. Accordingly, on November 3, 1953, the appointment terminated (*ibid.*).

Shortly thereafter, on December 28, 1953, the United States moved, pursuant to Section XIII of the judgment, for an order "carrying out said judgment" by directing appellant to dispose of its Indianapolis and Long Island plants "and for such other and further orders as may seem appropriate

and necessary to the Court" (R. 107-109). Following argument of this motion in January 1954 (R. 1-23), the court on May 4, 1954, rendered an opinion in which it concluded that it would not order appellant to dispose of the plants but would enjoin it from producing CO_2 or dry ice at either plant (R. 98-103).

The opinion declares (R. 102) that "the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto."[3] Section IX(E), the court found, reflected "two purposes, (1) to divest Liquid of the plants in question, and (2) to attempt to effect the sale thereof to persons who would operate them in competition with Liquid" (R. 101). "[T]heir accomplishment would not only have reduced the monopolistic power and influence of Liquid charged in the complaint but would also have provided added competition, one of the objectives sought to be obtained" (*ibid.*). Appellant's interpretation—that the trustee's failure to effect sale on the precise terms and conditions specified in Section IX(E) resulted in a complete discharge of appellant's divestiture obligation—"would do violence," the court declared, "to the intent" of the judgment and "would have the effect of robbing

[3] The court had previously noted at the argument on the motion (R. 22): "I participated in the conferences leading up to the consent decree,, as you know, over a period of many, many months— * * *. Many, many hours were taken in discussing it."

the Sherman Act of much of its efficacy, and would probably lead again to the conditions which this action and the said Act were designed to prevent" (R. 102). The court also noted (*ibid.*) that an affidavit submitted by appellant's president in opposition to the Government's motion showed that it was appellant's "understanding that the effect of the decree would be to proscribe further production activities at the plants in question * * *." The trustee's failure to find a purchaser who would use the plants for the manufacture of CO_2 or dry ice thwarted achievement of the "two purposes" of the decree (R. 101). "[T]he next best result, reducing Liquid's productive influence, could be accomplished," the court concluded, "as effectively by enjoining further production by Liquid at the plants in question as it could by compelling the sale and disposal thereof, and without subjecting Liquid to the possible substantial loss which might result from a sale under unfavorable circumstances and conditions" (*ibid.*). Accordingly, based on its opinion of "the intent and understanding of Liquid in consenting to the Final Judgment herein * * *" (R. 102), the court enjoined appellant "from the production at either of said plants of carbon dioxide and/or dry ice" (R. 103).

Reargument was granted on appellant's plea that it had no opportunity to oppose the precise relief the court ordered. At reargument, the Government requested that the injunctive relief be broadened to bar appellant's use of the two plants, not only for dry ice "production" but also for its "storage

and/or distribution" (R. 106). Granting the Government's request, the court reiterated its view that the "intent" of the judgment was not limited to providing for only "conditional" divestment, as appellant contended (R. 106), and that its prior action was "consistent and in harmony with the consent judgment" (*ibid.*). The court pointed out (*ibid.*) that sale of the plants by the trustee would have imposed "an even greater burden" upon appellant than the injunction issued, "for it would have resulted not only in a discontinuance of operations by Liquid but also in the introduction of additional competition in the areas involved * * *." Failure to extend the injunctive relief to cover storage and distribution as well as production, the court stated, "would nullify, in part at least, the consent decree entered herein." Therefore, "in order to effectuate what [it] believe[d] to be the basic purpose of the decree" (*ibid.*), the court enjoined appellant "from producing or storing at or distributing from its Long Island City, New York and Indianapolis, Indiana plants carbon dioxide and/or dry ice * * *" (R. 97). From that order, dated September 20, 1954, this appeal is taken.

Since entry of the order, appellant has sold its Long Island plant, Therefore, so far as the order under review relates to that plant, the appeal, as appellant recognizes (Br. p. 1, n.), is moot.

SUMMARY OF ARGUMENT

The district judge, who had played an active and important part in the formulation of the consent judgment, correctly interpreted its terms as obli-

gating appellant to dispose of the plants in question, even though the trustee could not effect their sale at reasonable prices to persons who would operate them to manufacture CO_2 or dry ice. The terms of the decree and the background against which it was formulated show that Section IX (E)'s divestiture requirement had two purposes: first, to reduce appellant's dominant market power; and, second, to provide new competition in the important New York City and Indianapolis markets. But these two purposes, although related, are severable. Failure to secure, by sale of the plants, the contemplated additional competition is not a reason to fail to effectuate the intended divestiture and thus diminish appellant's market command.

The court's order not only reduces appellant's productive capacity in two significant market areas, but, by eliminating the competitive threat which would remain if appellant retained the plants as standby capacity, encourages new producers to enter those areas. Since it appears that the plants may be more readily salable as real estate than as going concerns, the court's order would seem no more burdensome to appellant than sale through the trustee would have been. The order therefore provides an appropriate means for carrying out appellant's basic obligation to divest the plants.

Hughes v. *United States*, 342 U. S. 353, does not require invalidation of the district court's order. In that case, this Court held that Hughes had made full compliance with the decree in accordance with

its literal terms by exercising one of two specified options accorded him. Here, however, divestiture through the court-appointed trustee was frustrated. Under such circumstances, the district court correctly construed the decree as broad enough to permit an appropriate order designed to achieve divestiture by other, but hardly burdensome, means.

ARGUMENT

The Consent Judgment Obligated Appellant to Dispose of the Two Plants, Even Though the Trustee Could Not Sell Them to Purchasers Who Intended to Operate Them For the Production of CO_2 or Dry Ice. The Order of the District Court Was an Appropriate Means For Carrying Out This Obligation.

There is no dispute that Section IX (E) of the antitrust consent judgment contemplated disposal of appellant's Long Island City and Indianapolis plants. The single issue is whether the specification of particular methods of effectuating sale of the plants requires the inference that, since those methods have failed, appellant's obligation to divest vanishes, even though there remain other available means, no more burdensome to appellant, of implementing the decree. As set forth in the Statement, Section IX (E) provided in substance that the plants should be sold as complete units, by a trustee, to a purchaser who would operate them to manufacture CO_2 and/or dry ice. As appears from these terms and from the background against which the judgment was formulated, the decree aimed not only at limiting the market power of appellant (which had achieved dominance pri-

marily by a series of acquisitions) but sought, additionally, to give first call on the plants to those who might be prepared to provide timely and effective competition. The district court so construed its decree, holding that the trustee's failure to effect sale to a prospective competitor did not discharge the overriding obligation: the duty to effect divestiture. As we shall show, that construction was a reasonable one, and the court's injunctive order was an appropriate means for carrying out appellant's divestiture obligation.

A consent judgment is not a mere private contract between the parties but is a judgment of the court. *United States* v. *Swift & Co.*, 286 U. S. 106, 115; *Pope* v. *United States*, 323 U. S. 1, 12. Here, it was that in the very fullest sense. The district judge, as he stated during the argument on the Government's motion, "participated in the conferences leading up to the consent decree * * * over a period of many, many months—* * * Many, many hours were taken in discussing it" (R. 22). The unusually active role which the judge played in the formulation of the judgment peculiarly qualified him to evaluate the intention of the parties and the purposes of the decree.[4] His position is not unlike

[4] Generally, there is little participation by district courts in the fashioning of consent judgments. "Out of approximately 109 antitrust actions which terminated in consent decrees during the ten-year period ending August 5, 1945, 79 decrees were entered within three days of the original institution of the proceeding—hardly sufficient time for any judge to subject their terms to more than cursory scrutiny." Note, *The Modification of Antitrust Decrees*, 63 Harv. L. Rev. 320, 322, n.

that of the trial judge who has made findings of fact from the vantage point, denied to appellate courts, of one who has seen and heard the witnesses. Thus, his conclusion that the understanding of the parties and the purposes of the decree were such as to require the proscription of further productive activity at the plants is entitled to great weight. Unless arbitrary or clearly erroneous, it should not be set aside.

Like any other judgment, a consent judgment must be construed as a whole in light of the "issues it was meant to decide." *Vicksburg* v. *Henson,* 231 U.S. 259, 269; *Felker* v. *Southern Trust Co.,* 264 Fed. 798 (C. A. 8), certiorari denied, 254 U. S. 633; *Hendrie* v. *Lowmaster,* 152 F. 2d 83 (C. A. 6). "[W]hatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute." *Union Pacific R. R.* v. *Mason City &c. R. R.,* 222 U. S. 237, 247. The individual sections of a judgment "do not stand alone. They are to be read in connection with other paragraphs of the decree and with the allegations of the bill." *Swith & Co.* v. *United States,* 276 U. S. 311, 328.

Here, we submit, the pleadings and the judgment support the court's conclusion that there was an intention to establish a fixed obligation of divestiture. The complaint charged that appellant had embarked upon a program to eliminate competitors by acquiring their assets, and appellant admitted that it had acquired the assets of 17 companies. It further admitted that it and Pure (a co-conspira-

tor) were "the only companies in the United States having nationwide distribution of both CO_2 and dry ice." (See *supra*, pp. 3-4.) However, Pure apparently obtained its position in the national market primarily through long-term contracts, under which it tied up substantial sources of supply (see R. 8-9), rather than through acquiring competitors, as appellant had done.

The consent judgment reflects this difference in the source of the market power of the two companies. Under the judgment, Pure's dominance is to be reduced primarily by requiring it gradually to reduce its purchases from its principal supplier (Section IX(A), R. 81-82), and by prohibiting it from increasing existing, or entering into new, purchase contracts (Section IX(G), R. 85-86). But since appellant's dominance stemmed in large part from its acquisitions rather than from its supply contracts, the judgment also provided, in the case of appellant, for divestment as a necessary means of reducing appellant's power to monopolize and restrain trade. Section IX(E) obviously was designed to weaken appellant's hold on the significant New York City and Indianapolis markets [5] by compelling disposal of plants in those areas.

By requiring that the plants be sold to persons who would operate them to produce CO_2 or dry ice, the judgment served two purposes: (1) reducing

[5] As the court stated (R. 4) with respect to the Long Island City plant, "there aren't any competitors, we don't have any here in competition with the Long Island City plant, except for a plant in Belleville, I think it is, operated by Liquid now."

appellant's monopoly power; (2) providing for the operation of the plants by competitors. These two purposes, though related, are severable. When the trustee was unable to find the contemplated purchasers, the court correctly concluded that it should implement the first of the two purposes. Its order is truly the "next best result", for it prevents appellant from using the standby capacity represented by the plants as a means of discouraging in the future the competition which appellant, by its acquisitions, has suppressed in the past. To construe the judgment as permitting appellant to continue to operate these plants merely because the trustee had been unable to sell them to a competitor would, as the district court stated (R. 102), "tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless."

Furthermore, it appears that the order imposes no real hardship upon appellant, and may even result in financial benefit. Appellant conceded (R. 15, 16) that the Long Island City plant was a "high-cost plant" which "had more value as real estate than it had to a [CO_2] purchaser." Similarly, appellant acknowledged that "the plant at Indianapolis was not a modern plant, and that it likewise would not be sold readily to a purchaser who would operate it for CO_2 purposes." The injunction results in relieving appellant of its obligation under Section IX(E)(4) to maintain the plants as going concerns pending effectuation of sale. Appellant is thus free to sell the Indianapolis plant at

such time, upon such terms, and to such purchaser as it finds advantageous. As a practical matter, therefore, appellant can now comply with the divestment requirement more advantageously than it could when it was limited to selling the plant to a category of purchasers to whom the plants "would not be sold readily."

Contrary to appellant's contention (App. Br. 15-18), this Court's holding in *Hughes* v. *United States*, 342 U. S. 353, does not require invalidation of the district court's order. In that case a consent decree required a motion picture company (R. K. O.) to transfer its production and distribution business to a newly-created company and its exhibition business to another company, and to dissolve after transferring the stock of the two new companies to its own shareholders. Hughes, who owned 24% of R. K. O.'s stock, consented to a section of the decree which required that "Hughes may 'either' (A) sell his stock in one or the other of the two newly formed companies 'or' (B) deposit such stock with a court-designated trustee under a voting trust agreement to remain in force until Hughes shall have sold his stock in one of the companies" (pp. 355-356). Hughes deposited his stock with the trustee, and some time thereafter the district court, "[w]ithout evidence or findings of fact" (p. 356), entered an order directing the trustee to sell the deposited stock should Hughes fail to dispose of it. This Court held (pp. 356-357) that the "either/or wording" gave Hughes a choice of two different alternatives, namely, selling the stock or

depositing it with the trustee, and that the decree could not be read as requiring sale of the stock if Hughes exercised the second alternative.

Thus, in the *Hughes* case, the Court held that Hughes had made full compliance with the decree in accordance with its literal terms by trusteeing the stock. Here, however, divestiture through the court-appointed trustee was frustrated, and the question is whether the decree, read in the light of all of the relevant circumstances, is broad enough to permit an appropriate order achieving that end by other means. As we have shown above, the district judge's affirmative answer to that question was a reasonable one consistent with the decree and based upon a full appreciation of its background and purposes.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

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No. 25. LIQUID CARBONIC CORP. *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of New York. Argued October 19–20, 1955. Decided October 24, 1955. *Per Curiam:* The judgment is reversed and the case is remanded for a hearing on modification of the consent decree. *Hughes* v. *United States*, 342 U. S. 353. MR. JUSTICE REED and MR. JUSTICE BURTON dissent. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *James F. Dwyer* argued the cause and filed a brief for appellant. *John F. Davis* argued the cause for the United States. On the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Barnes* and *Daniel M. Friedman*. Reported below: 123 F. Supp. 653.